Anticompetitive Pricing Practices and the Competition Act
Theory, Law and Practice

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Executive Summary

Anticompetitive Pricing Practices and the Competition Act
Theory, Law and Practice

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Introduction

Anticompetitive pricing practices are frequently the subject of complaints to the Competition Bureau. In the five years beginning April 1, 1994, the Bureau received 931 complaints about alleged unfair pricing practices, such as predatory pricing, price discrimination and price maintenance. Despite the substantial volume of complaints, however, relatively few have been the subject of formal inquiries, even fewer are the subject of litigation and only a fraction of those have been successful.

Recently, concerns were raised regarding the effectiveness of the *Competition Act* provisions dealing with pricing practices and the Bureau's enforcement of them in the context of the debate on Bill C-235, a private member's bill which proposed to amend the *Competition Act* with the objective of better addressing certain forms of anticompetitive pricing activities. As a consequence of its consideration of the Bill, the Standing Committee on Industry resolved to review the pricing provisions of the *Competition Act* and their enforcement.

In anticipation of the Industry Committee's review, in June 1999, the Commissioner engaged the authors of this report to conduct this independent study of the provisions of the *Competition Act* dealing with anticompetitive pricing and their enforcement by the Bureau.

PART I Developing a Competition Policy Framework for Anticompetitive Pricing

Introduction

Section 1.1 of the *Competition Act* describes the purposes of Canadian competition law as follows:

> to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, to expand opportunities for Canadian participation in world markets, to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy, and to provide consumers with competitive prices and product choices.

Section 1.1 has been interpreted by the Bureau as endorsing the principle that competition law is geared to the maintenance and promotion of competition as a process, and not to the protection of competitors.

Such an interpretation recognizes that a normal characteristic of competition is that some market participants may not thrive or even survive while others prosper because of their superior competitive performance. This dynamic effect of competition is essential to ensure that the efficiency benefits of competition are realized. Reductions in the number of competitors should be permitted in the interests of efficiency where the survivor is a more efficient competitor, the reduction is not caused by anticompetitive conduct and the marketplace after the reduction in competition remains sufficiently competitive, taking into account potential as well as actual competition. Of course, protecting the competitive process will mean protecting competitors in some situations where they are threatened by anticompetitive conduct or their elimination would result in insufficient remaining competition. Distinguishing anticompetitive conduct from acceptable marketplace behaviour and determining what level of competition is sufficient are extremely difficult.

Because the purpose clause of the *Competition Act* states that competition is to be sought as a way to ensure opportunities for some particular subsets of enterprises, some competitors may legitimately expect broader protection through this law than a single minded commitment to the competitive process based solely on efficiency considerations would dictate. In other words, the purpose clause may be interpreted as expressing an intention to proscribe anticompetitive behaviour, even where the outcome is the removal of a less efficient competitor and sufficient competition remains in the market place. In this way, protecting fair and equitable opportunities for small and medium sized enterprises could lead to difficult tradeoffs with the promotion of efficiency.

In relation to anticompetitive pricing, respecting these sometimes competing interests is made more difficult by the evolving understanding of the economic effects and likely incidence of potentially anticompetitive pricing practices. Designing effective competition law rules is further complicated by changes in the marketplace. The challenge is to ensure that the law continues to fulfil its objectives as the markets to which it applies develop.

Economic Analysis

Introduction

Most economic analysis of competition policy is concerned with how to protect the competitive process by ensuring that markets function efficiently. From this perspective, the challenge is to design a regime which provides relief where pricing behaviour is actually destructive of efficiency enhancing competition. A pricing practice should be considered anticompetitive, for example, where it creates a risk that future prices and other terms of sale will be less favourable to consumers than they would be otherwise. In this Part, we discuss the circumstances in which pricing practices are considered anticompetitive under economic theory.

Price Discrimination

Price discrimination means charging different prices to different customers, whether other businesses or final consumers, for the same product where the differences in price do not reflect differences in the cost to the supplier of serving the customers. Three conditions are necessary for a firm to discriminate.

1. The firm must have sufficient *market power* to set price (otherwise customers charged higher prices would choose to purchase from a competing supplier).
2. The firm must be able to identify different classes of customers with *different levels of sensitivity to the price* of the product. These differences may arise because of different needs, income levels or uses of the product.
3. There is *limited opportunity for customers to resell to each other*. It must not be possible for customers paying a low price to sell to those for whom the product is priced more expensively.

Empirical evidence confirming the existence of price discrimination can be found relatively easily. Price discrimination, however, is not inherently anticompetitive. Indeed, it is very difficult to identify simple indicia of anticompetitive price discrimination. Much depends on the circumstances of each case. Often discrimination may be preferable to a situation in which discrimination is not practised.

If price discrimination simply results in expanding a market, an increase in welfare will result. If we assume that some groups of consumers would not ordinarily purchase any product at the price a non-discriminating seller would charge if it was restricted to a single-pricing strategy, these groups would be better off if the seller was willing and able to sell them product at a lower price. Price discrimination of this kind can increase total output and welfare. The low price buyers are better off and those buying at the price which would otherwise be charged are no worse off.

To the extent that the discriminator charges more than it would if discrimination were prohibited, discrimination will impose a loss on the consumers paying the higher price. How one views the distributive effect represented by this transfer to the price discriminator will be affected by various factors. These include whether the discriminator also discriminates by selling below the price it would charge in a single price world and whether there are efficiencies associated with the discrimination. For example, through discriminating, the discriminator may be able to expand production to a more efficient level.

In short, the consequences of the discrimination are difficult to characterize in the abstract. Any competition law provision designed to address anticompetitive price discrimination should be restricted to true price discrimination as defined at the beginning of this section. As well, some competitive effects test will be necessary because the existence and nature of any anticompetitive effect will depend upon the particular circumstances in which discrimination occurs in each case. Assessment of the competitive effects of discrimination will be difficult, imposing a need for significant data and difficult microeconomic forecasts of demand and other variables.

Predatory Pricing

Predatory pricing occurs where a firm temporarily charges particularly low prices in an attempt to deter market entry by new competitors, to drive out existing competitors, or to discipline competitors. While low pricing is commonly complained about by firms struggling to compete, it is hard to distinguish predation from aggressive competition in practice.

Prior to the 1980's, predation was regarded by economists as likely to be rare. This view was based on the assumption that to become an economically rational strategy for a firm there must be a reasonable prospect of recouping its losses after a successful low pricing campaign and that prospects for recoupment are low in the absence of high barriers to entry. If high prices were charged by a supposed predator after successfully eliminating or deterring competitors from entering a market with low barriers to entry, others would enter to take advantage of the high prices and the price would not be sustainable.

More recently, some sophisticated theoretical claims have been made suggesting a wider array of circumstances in which predation may be a rational strategy. Predation is more likely to be successful where the predator has better access to capital than the victim. Predation may be used to create a reputation for toughness. The reputation created by an act of predation at one time may be sufficient to deter future entry on an ongoing basis, allowing the predator to raise prices to recoup its investment in predation. Incumbent dominant firms may also successfully predate by lowering price upon entry by a new firm to send a signal either that demand is weak or that the predator's costs are so low that they can afford to reduce prices. In either case, the intended message may be that there is no prospect of profitable entry. In these ways, firms may use strategic behaviour to create barriers to entry.

Pricing can only be considered predatory where it is below some measure of the predator's cost. Most economists agree that prices below the predator's marginal cost of production are likely to be predatory, though because of the difficulty of assessing marginal cost, average variable cost is often used as a proxy. Similarly, in most circumstances, prices above average total cost will not be predatory. Whether prices between average variable cost and average total cost are predatory will depend upon the predator's market share, barriers to entry and other circumstances in the market.

Some commentators have suggested that evidence of intent is useful to distinguish true predation from pro-competitive price cutting. The difficulty with such an approach is that it is often impossible to produce reliable evidence of intent.

Empirical studies have found cases of predation. Nevertheless, there remains substantial disagreement regarding the prevalence of the practice.

The basic indicators of predation may be identified as follows, though none is conclusive.

1. Market power defined by reference to market shares and barriers to entry. In the absence

of market power, the prospect of recouping the costs of a predatory campaign is small.

2. A policy of selling at prices below some measure of the predator's cost.
    - (A) Where sales are at prices below average total cost and the predator has no pro-competitive explanation, such as
        - (I) meeting competition or changes in demand conditions; or
        - (II) excess supply.
    - (B) Where sales are at prices below average variable costs.

3. Evidence of predatory intent.

This simple listing raises but does not address, the challenge of how each of these indicators may be used in practice.

Price Maintenance

Price maintenance occurs where a firm tries to set a minimum price at which another firm can sell its product. Where price maintenance occurs horizontally between competitors who agree to fix their prices it is unambiguously anticompetitive. Where price maintenance is vertical, such as where a retailer agrees that it will not sell the products of a wholesale supplier for less than some price specified by the supplier, the effect on competition is more difficult to assess.

The economic rationale for prohibiting vertical resale price maintenance under competition law is that it lessens competition by restricting the ability of the retailer to compete on price. It leads to higher prices for consumers and higher margins for retailers, and, in the process, protects inefficient retailers that would not prosper in a truly competitive environment. In the absence of price maintenance, competition would be more likely to eliminate less efficient retailers and lead to price and cost reductions in the long run. Where price maintenance is implemented by a supplier solely in response to pressure from one of the supplier's large customers seeking to eliminate the low pricing policies of competitors of the customer, the only purpose may be to protect the large customer from price competition.

On the other hand, efficiency is typically served by freedom of contract and many commentators have suggested that vertical resale price maintenance should be permitted, at least in some circumstances. Suppliers may want to encourage resellers to compete on demand determinants other than price, such as service. Resale price maintenance ensures that retailers have an incentive to offer important consumer services because they are precluded from competing on price. Another efficiency explanation is that suppliers, such as those in the designer clothing industry, may want to maintain a certain image of their product which can be damaged by the item being discounted or used as a loss leader.

It is possible to identify some of the economic indicia of anticompetitive vertical price maintenance as follows:

1. The person implementing price maintenance (the '*Supplier*") has market power, a characteristic of which is limited opportunities for customers to change suppliers; and

2. The Supplier does not have an efficiency based justification, such as a desire to increase service or prevent brand impairing practices, which would include loss leadering or misleading advertising.

Challenges of the New Economy

The Canadian economy has become increasingly competitive as a consequence of globalization, due, in part, to the ongoing process of trade liberalization. As well, in certain sectors the channels of distribution have substantially changed. The emergence of "big box" retailing and internet distribution are both a response to and a cause of increased competitiveness. Even more fundamentally, the economy is currently undergoing a radical transformation; it is becoming more and more knowledge-based and increasingly innovation-driven. The following features of the new economy may require a rethinking of competition policy in relation to anticompetitive pricing especially predatory pricing: (1) accelerating technological change; (2) increasing returns and declining or zero marginal cost as units of output increase; (3) market dominance by firms is more likely to be short-lived or non-existent; and (4) the desirability and benefits of setting industry standards.

Legitimate efficiency enhancing competition through low pricing practices is likely to become more pervasive. In some industries, high rates of innovation will continually drive down costs. The prospect of declining marginal costs and increasing returns associated with increased production will also encourage low pricing strategies. Such strategies may be most common where establishing the industry standard may have substantial benefits, such as in software where a program's value increases with the number of users.

Technology is driving down barriers to entry, both through innovations in marketing and distribution, such as internet sales, and by creating low cost ways of carrying on business. When one combines declining barriers to entry with increasing threats to dominance in some markets from new products and technologies, the likelihood that dominance can be exploited to injure competition through anticompetitive pricing practices is substantially reduced. At the same time, a characteristic of an innovation driven market is that the innovator will be dominant, at least for a time and that there may be efficiencies associated with dominance, including the promotion of further innovation.

In the new economy, the challenge of accurately identifying and taking enforcement action against anticompetitive pricing behaviour will become more daunting. The Competition Bureau will need to be vigilant to ensure that its enforcement policies are both informed by and sensitive to the exigencies of the new economy. In part, this means that competition authorities should increasingly emphasize dynamic over static efficiency goals in their enforcement analysis. Dynamic efficiency recognizes, for example, that innovation is essential to efficiency, that the establishment of a standard may be beneficial to consumers and, in any event, that any standard will not be sustainable in the long term since standards themselves are a significant site of competition.

PART II *Competition Act* Provisions Dealing with Anticompetitive Pricing

Price Discrimination

General Discussion

A criminal prohibition on price discrimination was introduced into Canadian law to address concerns that large buyers might be able to use their market power to extract unfairly large discounts from suppliers. The grocery industry was identified as particularly threatened by this type of behaviour. The purpose of the provision was to protect small business.

The essence of the current provision is a prohibition on suppliers engaged in a practice of granting concessions on price to one purchaser which are not available to competing purchasers of the same article in like quality and quantity. The provision contains some significant limitations. Unlike most of the provisions of the *Act*, it only applies to a "sale" of "articles". Other forms of transactions, such as leases are not included; sales of anything other than an article, such as a service, are not included.

Price Discrimination Enforcement Guidelines

The *Price Discrimination Enforcement Guidelines*, published by the Bureau in 1992, purport to set out the Bureau's enforcement policy and its interpretation of the price discrimination provisions. The *Guidelines* indicate that the Bureau is unlikely to take action against a wide range of discounting practices taking the form of discounts which are available upon the purchaser fulfilling some condition, such as performing a service for the seller. Such discounts are not likely to raise issues assuming that they are available to all purchasers who compete with each other.

Some aspects of the *Guidelines* have been criticized as departing from the language of the *Act*. The requirement that discounts and other concessions be "available" to competing customers is interpreted in a manner which is, arguably, inconsistent with section 50(1)(a) and unduly onerous because it requires suppliers to actually offer discounts to all customers in some circumstances.

Also, the *Guidelines* appear to create an exemption for enforcement purposes for sales between affiliates, when none exists in the *Act*. The Bureau may consider transactions between affiliates as being something other than sales and so outside the reach of the price discrimination provision. The jurisprudence on what is a sale, however, is well settled. It seems unlikely that a court would exclude a transaction between affiliates if the formal requirements for a sale, including, in particular, the passing of title, are met.

In a similar way, the *Guidelines* indicate that all the franchisees in a franchise system may be treated as a single economic unit, such that anyone selling to the franchisees may aggregate all their purchases for the purpose of granting volume discounts. Where the franchisees make their purchases individually and are individually responsible for payment, this interpretation seems doubtful, since separate sales take place between the supplier and each franchisee.

Predatory Pricing

General Discussion

Predatory pricing is a criminal offence under section 50(1)(c) of the *Competition Act*. Several elements must be established before the offence is proven. The alleged predator must be engaged in business and engaged in a "policy" of selling products at prices which are "unreasonably low." Also, one of four (4) alternative requirements must be met:

1. the policy must have the effect or tendency of substantially lessening competition;
2. the policy must have the effect or tendency of eliminating a competitor;
3. the policy must be designed to substantially lessen competition; or
4. the policy must be designed to eliminate a competitor.

There has been very little jurisprudence to inform the interpretation of these requirements. In *Hoffman-La Roche,* it was held that before a policy will be found there must be a conscious decision to sell at an unreasonably low price and there must be continuing or repeated sales, though a written policy need not be found.

"Unreasonably low" was interpreted in the *Consumers Glass* case. The court stated that the purpose of section 50(1)(c) was to prohibit selling at low prices for an anticompetitive purpose. The Court did not give any indication as to how to identity such a purpose, except to say that an anticompetitive purpose should not be inferred from the fact that a firm sets prices to a particular level with the intention of gaining business from a rival even if the alleged predator knew that pricing at that level would make it difficult for a new entrant to stay in the market. The court stated that setting prices so as to take business away from rivals for the purpose of minimizing losses to a new entrant or maximizing profit is the whole object of competition.

Where a price reduction is defensive, that is, in response to price cutting by a rival, even if it is a pre-emptive response, pricing is unlikely to be found to be unreasonably low unless it is disproportionate, in some way, to the rival's behaviour.

Another factor relevant to determining if prices are unreasonably low is cost. The courts have not been clear on what is the appropriate cost based test. While *Consumers Glass* and *Hoffman-La Roche* held that pricing above average total cost could not be predatory, a presumption of predation from pricing below average variable cost has not been adopted, nor has a test been articulated for pricing between average variable cost and average total cost.

The case law provides no real guidance on the interpretation of the four final alternative requirements of section 50(1)(c).

The Predatory Pricing Enforcement Guidelines

In 1992, the Competition Bureau issued the *Predatory Pricing Enforcement Guidelines* which adopt a two part test to determine whether prices are unreasonably low. First, the Bureau looks at one of the key indicators of predation identified in Part I: market power, including market share and barriers to entry. A market share of 35% is generally considered the threshold below which market power is unlikely to be sufficient. Under the *Guidelines*, barriers to entry include cost advantages enjoyed by an incumbent firm, such as licensing requirements which the incumbent has already satisfied, costs associated with acquiring market specific assets and control of essential technology or sources of raw materials through vertical integration. The *Guidelines* acknowledge the possible existence of strategic barriers, such as a reputation for predation.

The second step, in determining whether there is evidence of unreasonableness, is to apply a cost based test. Consistent with *Consumers Glass* and *Hoffman-La Roche*, prices above average total cost will not be considered to be unreasonable low. The *Guidelines* go on to provide specific guidance regarding other price/cost comparisons. Prices less than average variable cost will be considered to be unreasonably low in the absence of some legitimate commercial objective, such as the need to sell off perishable inventory. Whether prices between average total cost and average variable cost will be considered predatory will depend on the circumstances.

The two stage test in the *Guidelines* is only concerned with the likely effect in the market, with whether the alleged predator is going to be able to recoup its losses. The test itself may not be satisfied where the effect is only to eliminate a competitor. Section 50(1)(c), however, specifically refers to unreasonably low pricing policies having the effect or tendency or eliminating a competitor as well as to policies designed to substantially lessen competition or eliminate a competitor. A policy may be found to be designed to have these effects regardless of whether it has or is likely to have them.

Several statements in the *Guidelines* suggest that meeting the two stage test is not an absolute threshold requirement for proceeding with a complaint about predatory pricing. The *Guidelines* indicate that unreasonable low prices may be inferred from all the circumstances including, evidence of predatory intent and the exclusion or elimination of competitors. The thrust of the *Guidelines*, however, is to de-emphasise these bases of liability.

Price Maintenance

General Discussion

Under section 61 of the *Competition Act*, it is illegal for a person engaged in business to attempt to influence upward or discourage the reduction of the price at which any other person engaged in business offers or supplies a product in Canada by "any agreement, threat, promise or like means". Requests, discussion, persuasion and suggestions directed toward the maintenance of prices, however, are all permitted. Breach of the provision is a criminal offence.

Refusing to supply or otherwise discriminating against a person because of that person's low pricing policy is similarly prohibited. It is sufficient for a conviction, if the low pricing policy is one of the reasons for the refusal. Section 61(10) provides four (4) defences for refusing to supply. A supplier may refuse to supply a person where that person is making a practice of any of the following:

1. using products supplied as loss leaders;
2. using products supplied not for the purpose of selling them for a profit but to attract customers to buy other products;
3. engaging in misleading advertising in respect of the products supplied; and
4. not providing the level of service that purchasers of the products might reasonably expect.

Under section 61(6) no person may, by threat, promise or any like means attempt to induce a supplier, as a condition of doing business with the supplier, to refuse to supply a product to a particular person because of the low pricing policy of that person.

Abuse of Dominance

The abuse of dominance provision was introduced into Canadian competition law in 1986 to replace the criminal monopoly provision. The purpose of the provision is not to address the fact of structural dominance in a market, but to provide relief where dominance has been used to abuse the interests of consumers or producers. While the old monopoly provision and the provisions prohibiting price discrimination, predatory pricing, and resale price maintenance create criminal offences under the *Competition Act*, the provisions dealing with abuse of dominant position provide for civil review by the Competition Tribunal applying the civil standard of proof.

Section 79(1) provides as follows:

> Where, on application by the Commissioner, the Tribunal finds that

1. one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
2. that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
3. the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

In order to assess the degree of control by the allegedly dominant firm, the first step is to define the relevant product and geographic dimensions of the market. "[S]ubstantial control" has been equated with market power, meaning that the allegedly dominant firm has the ability to maintain prices above competitive levels for a considerable period. The primary indicators of market power are market share and barriers to entry. High market share alone will give rise to a presumption of dominance. In *Laidlaw*, the Tribunal stated that dominance would not be presumed where market share is below 50%.

Once dominance is established the Tribunal must determine that the dominant firm has engaged in a practice of anticompetitive acts which has had, is having or is likely to have the effect of preventing or lessening competition substantially. Section 78 of the *Competition Act* lists a number of anticompetitive practices which the Competition Tribunal may find to constitute abuse. Some of the types of behaviour referred to in section 78 relate to pricing. In any case, the list is not exhaustive and, in several cases, acts outside those specified in section 78 have been found to be abusive. Price manipulation may be used by a dominant firm in a wide variety of ways to discipline, deter or eliminate competitors. In the abuse cases so far, however, pricing issues have played a relatively small role.

One of the anticompetitive acts alleged in *NutraSweet* was predatory pricing. Although, ultimately, the Tribunal did not find evidence of predation it made several comments which will undoubtedly inform the manner in which predation will be dealt with in future cases. First, the Tribunal accepted that predation could be an anticompetitive act under section 79. Second, the Tribunal stated that pricing below marginal cost should be deemed predatory. Third, the Tribunal indicated that predation is not a rational strategy unless there is some prospect of recoupment and accepted that a firm may signal an intention to predate in one market by predatory activity in another.

Finally, the Tribunal must find a substantial lessening of competition. This test has been held to require that the anticompetitive acts of the dominant firm preserve or add to the dominant firm's market power. In particular, the Tribunal will ask whether the action creates or strengthens barriers to entry as well assessing the magnitude of this effect. The Tribunal must also give consideration to the possibility that the practice was a result of "superior competitive performance."

Part III Enforcement of *Competition Act* Provisions by the Bureau

Introduction

This part of the report provides (i) a brief overview of the process by which the Bureau deals with complaints, followed by (ii) a statistical profile of the Bureau's enforcement experience for all complaints dealt with by the Bureau over the five (5) year period beginning April 1, 1994 and ending March 31, 1999 (the "*Review Period*") which concerned price discrimination, predatory pricing or price maintenance and (iii) a discussion of the criteria used by the Bureau to select cases for enforcement action.

Complaints Process

Bureau commerce officers are responsible for making a preliminary assessment of each complaint received. In cases where the responsible commerce officer determines that the complaint does not disclose any basis for proceeding under the *Act*, the officer may terminate the investigation. If, after a preliminary assessment, it appears to the officer and his or her supervisor that there is a basis for a more thorough review, a complaint is designated as a "project" and further work is done, including applying the case selection criteria developed by the Bureau, gathering more complete information and identifying and assessing the strength of evidence.

In light of the results of the application of the case selection criteria and this more comprehensive analysis, a decision is made as to whether the case has sufficient merit to justify going forward to the next stage, the commencement of an inquiry by the Commissioner. Once an inquiry has been commenced the Commissioner can use his formal investigative powers, including seeking an order directing a person to be examined under oath or a warrant authorizing the searching of premises and the seizing of documents.

Alternatively, at any stage, the investigation of a complaint may be terminated or some kind of alternative case resolution ("*ACR*") reached. An ACR may take various forms from a simple information visit by Bureau staff to explain the *Act* to formal undertakings monitored by the Bureau and consent prohibition orders.

Summary of Statistical Record of Enforcement Experience

During the Review Period, 931 complaints were received but very few rose to the level of the more intensive review characterizing the project stage. The overwhelming majority of complaints (88%) were terminated by commerce officers and their supervisors. Ofthe complaints which did become projects, in fewer than 1/3 was an inquiry initiated and formal enforcement proceedings were extremely rare. By contrast, ACR's were successfully used in about 10% of complaints.

Price maintenance was the most frequently complained about anticompetitive pricing practice (461 complaints), though it was fairly closely followed by predatory pricing (382 complaints). Notwithstanding the pervasiveness of price discrimination, the number of price discrimination complaints was a relatively small proportion of the total (88 complaints).

Price maintenance was the only anticompetitive pricing practice in relation to which the Bureau took formal enforcement proceedings, though the number of occasions was very small (3). This rare resort to formal enforcement in price maintenance cases during the Review Period represented a significant change in enforcement policy from years before the Review Period. Formal enforcement activity was largely replaced by ACR's.

In contrast to price maintenance, the number of formal enforcement actions with respect to price discrimination and predatory pricing has never been substantial. That there were none during the Review Period is consistent with earlier enforcement activity. The proportion of price discrimination and predatory pricing complaints resolved through alternative case resolutions during the Review Period was also very small.

Complaints are received from a wide variety of industries. With the notable exception of gasoline (16.7% of complaints), no single industry appeared to be the source of a disproportionate number of complaints. There were certain industries in which there were serious enough concerns that projects were commenced in a significant number of cases: gas, groceries, telecommunications and waste, together accounting for almost 50% of total Bureau projects relating to pricing. It is also notable that the overwhelming significance of gasoline in complaints did not follow through into projects, where groceries, telecommunications and waste were all more frequently the subject of the more thorough investigations to which projects are subject.

Case Selection Criteria

Introduction

In an era of continually shrinking resources, it is essential for any government organization to put in place systems which will assist it to marshal its resources most effectively to accomplish its mandate. In response to its expanded responsibilities and constrained resources, the Bureau has adopted case selection criteria to ensure that competing priorities are evaluated in a systematic way and that resources within each branch are efficiently allocated.

The core of the case selection criteria consists of four (4) categories of factors:

1. Economic Impact
2. Enforcement Policy
3. Strength of the Case
4. Management Considerations

From the interviews conducted for this study, it is clear that the case selection criteria are used as a guide to management decision making not a substitute. Often, it was suggested that if a case was considered to have sufficient merit, it could be proceeded with notwithstanding a low score. Consequently, while there are several aspects of the case selection criteria which may tend to produce low scores when applied to pricing cases, it seems that this would not necessarily prevent a meritorious case from proceeding.

The enforcement policy expressed in the case selection criteria attach no priority to price discrimination or vertical price maintenance cases. Indeed price discrimination is not even referred to. As well, the significance given to the economic impact of the anticompetitive conduct under the criteria may tend to lead to lower scores in such cases, since often the activity complained about may be restricted to local markets. In the case of price maintenance, this negative effect may be significantly offset because the likelihood and availability of ACR's provides a meaningful alternative to prosecution making enforcement action much more cost effective and leading to higher scores under management considerations. Also, meritorious price maintenance cases are likely to receive high scores on the strength of case criterion because the requirements for the offence are relatively straightforward.

With respect to predation cases, several features of the criteria seem likely to reduce scores in most cases. Like price maintenance and price discrimination, predation cases are not a priority and tend to be in local markets in which the economic impact may be low. As poor candidates for ACR's, the only option for resolving a predation case is likely to be a drawn out prosecution which will score poorly on the management considerations criteria. With respect to strength of case, the criteria do not give points if pricing is above average variable cost or for evidence of intent. Given the analytical and evidentiary challenges associated with meeting the two part test, this restriction on the cost/price comparison and the lack of recognition of intent evidence, means that predation cases are unlikely to score well under this criteria.

Part IV Elements of a Competition Regime - Summary and Conclusions

Conclusions Regarding Specific Types of Anticompetitive Pricing Practices

Price Discrimination

Adequacy of Existing Provisions - The current criminal price discrimination provision, section 50(1)(a), is not adequate to address anticompetitive price discrimination. The economic analysis in Part I concludes that whether there is any possibility that price discrimination will have an anticompetitive effect will depend on the facts of each case. The current provision does not require a discriminating supplier to have market power, a prerequisite to true discrimination, nor does it require any assessment of the effect of discrimination on competition. More specifically, it does not accurately reflect the legitimate bases upon which customers may be treated differently. The economic analysis in Part I suggests that only differences in the costs of serving different customers rather than simply differences in quantity and quality, should be adopted as the standard. The requirement that discrimination relate to articles of like quality and quantity are partial and imperfect proxies for the different costs of serving customers. To this extent the provision is over-inclusive.

At the same time, by failing to include discrimination in services and discrimination in forms of transactions other than sales, the provision excludes important areas of economic activity in the contemporary marketplace. In its present form, the criminal price discrimination provision is not an accurate tool for addressing anticompetitive behaviour and imposes excessive compliance and monitoring costs on business. Because price discrimination is a criminal offence, this chilling effect is exacerbated.

Dealing with price discrimination as a species of abuse of dominance under section 79 has the potential to address some of the defects in the criminal price discrimination provision. The abuse provision incorporates the market power test which economic theory identifies as a prerequisite to discrimination and requires there to be an assessment of the effect of the discrimination on competition.

The abuse of dominance provision also provides a process which would permit the Competition Tribunal to achieve an accommodation of the prescriptions of economic theory and the interests of individual businesses in being protected against being discriminated against by their suppliers. The weight of economic theory suggests that the purpose of the *Act* should be the protection of competition in the interests of efficiency and not individual competitors and the purpose clause of the *Act* as well as many provisions in the *Act* reflect this emphasis. Nevertheless, the legislative history of section 50(1)(a), as well as the purpose clause of the *Act*, speak to the need to ensure, in the words of section 1.1, that competition be maintained in order to ensure "that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy." Under section 79, it would be up to the Tribunal to decide whether relief was appropriate given the effects on competition in general including any prejudice experienced by individual competitors in the context of particular cases.

Nevertheless, applying section 79 to price discrimination complaints faces several challenges. The approach to market power in the abuse provision may have to be adapted for price discrimination cases. Consideration will have to be given to the appropriate market share threshold. As well, thought will have to be given to how to assess competitive effects when the dominant firm operates in a different market from that in which the person who is affected carries on business. In practice, dealing with price discrimination under section 79 would be much less certain and predictable than the criminal price discrimination, though this problem is somewhat mitigated by the requirement for market power.

Adequacy of Price Discrimination Enforcement Guidelines - In their current form, the *Price Discrimination Enforcement Guidelines* are useful, though the *Guidelines* cannot fully correct for the defects in the criminal price discrimination provision to create a provision consistent with the economic analysis in Part I.

Some improvements are needed, however. Work needs to be done to revise the analysis of the circumstances in which price concessions are available and when a sale will be considered to have taken place. As well, although there is no technical impediment to applying section 79 to price discrimination, in order to ensure that price discrimination is routinely analyzed under the abuse provision, the *Guidelines* would have to be revamped to describe how this would be done in light of the issues raised in the preceding section.

Adequacy of Enforcement Activity - Without assessing the relative value of the Bureau's many other activities, it is impossible to draw any definitive conclusion regarding the Bureau's enforcement record with respect to price discrimination. One can say that the present criminal provision is sufficiently defective that, in pursuing its general mandate to protect competition, it is appropriate for the Bureau to adopt a very conservative enforcement approach in dealing with the relatively few complaints made regarding discriminatory pricing. With respect to taking cases under the abuse provision, there are a variety of questions which would arise with respect to how the Competition Tribunal would deal with a price discrimination case. It is not obvious that pursuing cases to resolve these questions would be a responsible use of the Bureau's constrained resources, except perhaps where price discrimination is one of a number of alleged anticompetitive acts or the anticompetitive effect is substantial.

Predatory Pricing

Adequacy of Provisions - Because the case law does not provide a complete methodology for determining when the prices an alleged predator are unreasonably low under section 50(1)(c), the section is, potentially, very broad. Any intention to eliminate a competitor or the elimination of a competitor in fact, combined with low prices, may be sufficient for liability. While efficiency concerns might argue in favour of a regime which prevented below cost pricing which had the effect of eliminating more efficient, vigorous or innovative competitors, the existing provision protects all competitors, regardless of the overall effect on competition or efficiency. To this extent, the provision is in conflict with the economic analysis of predation.

Dealing with predation under section 79 avoids these problems. As prescribed by economic analysis in Part I, section 79 imposes market power as a threshold for obtaining relief. The abuse provision offers the lower civil burden of proof which may be important given the inherently contestable nature of claims regarding predation.

As well, section 79 requires an assessment of the effect on competition. The Tribunal would be able to consider not only whether there was a prospect of recoupment through supra-competitive pricing, but also the effects of predatory behaviour on the dynamic of competition in the market in which the predation took place. Such effects would include effect of the loss of particular competitors and their prospects for re-entry. The Tribunal could sort out the extent to which it was appropriate to take into account non-efficiency based considerations, such as the fairness of intentionally eliminating a competitor through low prices.

Nevertheless, section 79 does not provide a specific methodology for dealing with predation and the existing approach of the Tribunal to the critical concept of market power would have to be developed and adapted for use in predation cases. In particular, as suggested in the *Predatory Pricing Enforcement Guidelines*, there may be cases of predation where the predator has a market share below the rough 50 percent guide referred to by the Tribunal in its cases to date. As well, strategic behaviour on the part of the dominant firm plays a larger role in predation cases.

One possible hurdle to obtaining relief from the Tribunal is its expressed unwillingness to directly interfere with pricing decisions by firms. It may be reluctant to order a firm to cease specific pricing behaviour such by as setting a minimum price. Ordering a firm to simply stop predating would be virtually unenforceable. Some appropriate remedial approach would have to be developed before section 79 could be relied on as an effective way to deal with predation.

Adequacy of Predatory Pricing Enforcement Guidelines - The approach to enforcement taken in the Bureau's *Predatory Pricing Enforcement Guidelines* is generally consistent with the factors indicating predation identified in Part I. Nevertheless, the Bureau may be setting a standard which is tougher than is appropriate in practice.

The two part test established in the *Guidelines* is a very high standard. The need to prove market power sufficient to permit recoupment to the criminal standard of proof, beyond a reasonable doubt, is very onerous, given the ultimately contestable nature of claims about market power. Obtaining good evidence of the alleged predator's costs will be extremely difficult in many circumstances, such as where the predator is extensively vertically integrated. In other circumstances, it will be impossible to obtain cost evidence without the exercise of formal search powers and the inability to demonstrate a credible prospect of recoupment may well make it impossible to take this step.

While reliance on intent evidence may relieve some of these problems, such evidence will not be available in some cases and in many others will be unreliable. In any case, the *Guidelines* suggest that intent will play a small role in the Bureau's assessment.

The *Predatory Pricing Enforcement Guidelines* do not emphasize or provide guidance on the possible application of the newer theories suggesting a wider array of situations in which predation may be present. They do not fully reflect this new learning regarding how strategic barriers to entry may be identified and measured and how non-price benefits associated with a predatory strategy should be taken into account. Also, as discussed more fully below, the *Guidelines* do not address the challenges *of the new economy* specifically.

While section 79 could be used to deal with predation cases, as indicated above, there are a range of questions which would need to be resolved with respect to its application and these are not currently addressed in the *Guidelines*.

Adequacy of Enforcement - Prosecutions under the criminal predatory pricing provision have been rare and there has never been a successful application to the Tribunal in relation to predation. While it is impossible to draw firm conclusions regarding this enforcement record without considering the merits of competing priorities, there are some reasons to be concerned about it.

The Bureau's approach in the *Guidelines* is in need of improvement if it is to be an accurate tool for assessing allegations of predation. As well, the Bureau's case selection criteria appear to disfavour predation cases in two main ways. First, the case selection criteria give weight to a narrower range of predatory behaviour than the *Guidelines* and the economic analysis in Part I would suggest may exist. Second, because ACR's seem to be rarely successful in predation cases and, consequently, there is no alternative to a contested case with the attendant commitments of time and expense, predation cases will rank poorly under the management considerations factor. Finally, the lack of certainty regarding the law on predation argues in favour of the Bureau seeking to initiate predation cases more aggressively.

Price Maintenance

Adequacy of Existing Provisions - The present provision dealing with price maintenance is not designed to address only anticompetitive price maintenance based on the criteria suggested by economic analysis. Consequently, in its present form, it is not an accurate tool for taking enforcement action and likely imposes excessive compliance and monitoring costs on business. This chilling effect is exacerbated by the criminal nature of the offence of price maintenance.

The application of the existing abuse of dominance provision to price maintenance cases would require consideration of the market power of the person seeking to maintain prices and the effect on competition as suggested by the economic analysis in Part I. As noted in relation to price discrimination, it would require the Tribunal to consider the need to balance the interests of economic efficiency against the interest of businesses in being free from coercion by their suppliers on the facts of individual cases.

Relying on section 79 is not without challenges, however. Since section 79 is not specifically adapted to dealing with price maintenance cases, the development of some analytical framework taking into account the efficiency based explanations discussed in Part I would be necessary. It is not obvious that the market power requirement should be the same in price maintenance cases as in the cases dealt with by the Tribunal so far. The issue of question of how to deal with the anticompetitive effects in downstream markets would also need to be addressed.

Adequacy of Enforcement - Formal enforcement actions used to be very common with respect to price maintenance. The enforcement profile in Part III shows that this has changed dramatically. Formal enforcement actions during the Review Period were rare. During the same time period, the use of ACR's as a substitute was remarkably successful.

Given the restricted focus of this study, an overall assessment of the Bureau's enforcement record cannot be made. There would appear to be no compelling need to engage in more formal enforcement actions under the existing criminal provision as an alternative to ACR's since the criminal provision is very clear and the subject of substantial case law. Consequently, the Bureau's emphasis on ACR's would seem to be appropriate.

Inevitably, dealing with price maintenance under section 79, imposing a market power requirement and permitting efficiency defences, would make it much more difficult to deal with price maintenance using the ACR approach. The requirement to gather sufficient information to make an accurate assessment, alone will greatly extend the period of time before ACR discussions can begin in many cases. Also, again in many cases, the existence of market power and efficiencies will be contestable conclusions in contrast to the relative certainty associated with proving that the very specific requirements in the current section 61 are met. From the perspective of compliance, resort to section 79 would be far less predictable.

In any case, the economic analysis in Part I suggests that addressing price maintenance under section 79 should yield more accurate enforcement activity than the *per se* approach in section 61. Consequently a cautious approach to the enforcement of section 61 is appropriate, focusing on price maintenance where there is a clear anticompetitive effect. The Bureau's case selection criteria reflect this focus.

General Comments

Challenges of the New Economy

In the new economy, competition will continue to increase in intensity and the pace of technological change will continue to accelerate. In industries most affected by these trends, the challenge of accurately identifying and taking enforcement action against anticompetitive pricing behaviour will be daunting. The Bureau needs to ensure that its enforcement of the *Competition Act* reflects an appreciation of how these industries operate.

The competition policy analysis currently conducted by the Bureau recognizes dynamic efficiency considerations which will become increasingly important in assessing competitive effects in the context of the new economy. The structure of section 79 permits dynamic efficiency considerations to be taken into account. As well, the framework developed for interpreting the predatory pricing provision in the *Predatory Pricing Enforcement Guidelines*, takes into account dynamic efficiency. With respect to neither provision, however, has the Bureau spelled out how it will address dynamic efficiency in the specific context of the industries of the new economy. More importantly, the current *per se* criminal provisions dealing with price discrimination and price maintenance, on their face, provide little scope for a dynamic efficiency analysis. Accordingly, one may be concerned that these provisions are not well adapted to be responsive to the changes currently transforming the Canadian economy.

Marshaling Industry Specific Expertise

Through experience particular Bureau officers have gained an in depth understanding of particular industries but more effective marshalling of industry specific expertise at the Competition Bureau is critical to ensuring that officers are equipped to make accurate judgements on the high volume of complaints which were disposed of based on their analysis alone. The need for industry specific expertise is most pressing in relation to predation cases where the assessment of market dynamics is most complex. Enhanced industry specific expertise may also permit complaints to be processed in a more timely and cost effective manner.

The Limitations of Guidelines

Through its *Price Discrimination Enforcement Guidelines* and *Predatory Pricing Enforcement Guidelines* the Bureau has attempted to provide, for enforcement purposes, a coherent rationale for enforcing the criminal provisions dealing with price discrimination and predatory pricing. Despite some of the criticisms made above, for the most part, this has been a very effective approach to enforcement. Guidelines are significantly more cost effective than litigation for the purposes of clarifying interpretive uncertainty. They can deal with issues comprehensively and within an analytical framework, while decisions in individual cases contribute only incrementally to the understanding of the law and the analysis may be tied to the facts of each case. Guidelines increase the likelihood of consistent and accurate decision making by commerce officers making the difficult assessments of cases at the critical preliminary assessment stage. By disclosing a clear approach to enforcement, guidelines may facilitate ACR's and, more generally, will ease the compliance burden for business.

Nevertheless guidelines have limits. Guidelines have no binding effect on the Bureau and provide no defence to private enforcement. They are not capable of correcting basic defects in the law. To the extent that the enforcement policy disclosed in guidelines is at variance with the provisions themselves, the guidelines are less reliable. As well, there is a risk that a gap will be created between the expectations about enforcement based on the provisions of the *Act* and enforcement activity based on the guidelines. We have found that there are several ways in which the *Price Discrimination Enforcement Guidelines* and *Predatory Pricing Enforcement Guidelines* adopt interpretations which stretch the provisions of the *Act*. When one examines the case selection criteria, one finds additional criteria not specified in the *Act*.

In order for guidelines and other voluntary compliance strategies to be successful, they must be accompanied by formal enforcement activity to show that enforcement is a credible threat and to clarify the law. By showing the defects in the law, formal enforcement encourages law reform.

Formal enforcement may be useful in relation to pricing practices. There are significant differences between what economic theory would prescribe and the criminal provisions dealing with anticompetitive pricing. In part, this is because the pricing provisions were designed to protect certain categories of competitors from activities of other competitors perceived to be unfair, rather than the promotion of overall economic efficiency. These conflicts between the protection of competitors and the promotion of efficiency should be resolved in the courts, before the Tribunal or though legislative reform.

Admittedly, the litigation alternative is not a very efficient way of protecting competition, exposing problems with the law or clarifying its operation and would impose enormous resource demands on the Bureau. One possible solution may be to permit private access to the Tribunal.

Improved Communications Strategy

The Bureau needs to find a more effective communications strategy to make the *Act* and the role and practice of the Bureau better understood by the business community and the public. While the work of the Bureau has become significantly more transparent in the past few years, interviews conducted for this study revealed that substantial work remains to be done. Promoting better understanding of its interpretation and analysis would encourage compliance, enhance the legitimacy of the Bureau's activities and provide a basis for informed public discussion of the extent to which Canada's competition law dealing with anticompetitive pricing is adequate.

Anticompetitive Pricing Practices and the Competition Act
Theory, Law and Practice

Introduction

Background

Anticompetitive pricing practices are frequently the subject of complaints to the Competition Bureau.[1] In the five years beginning April 1, 1994, the Bureau received 931 complaints about alleged unfair pricing practices, such as predatory pricing, price discrimination and price maintenance. Complaints are most often heard from participants in the retail gasoline sector but are common in other sectors of the economy as well.[2]

Anticompetitive pricing practices are dealt with under various provisions of the *Competition Act*, notably the criminal prohibitions against predatory pricing, price discrimination and price maintenance. As well, the abuse of dominance provision allows the Bureau to apply to the Competition Tribunal for an order prohibiting a dominant firm or firms from engaging in pricing practices which constitute an abuse of their market power. Every time a complaint is made, it is reviewed by the Competition Bureau and may be the subject of a formal inquiry ultimately leading to enforcement action in some cases, including referral to the Attorney-General for criminal prosecution or an application to the Competition Tribunal. Despite the substantial volume of complaints about pricing practices, however, relatively few have been the subject of formal inquiries, even fewer are the subject of litigation and only a fraction of those have been successful.

Some industry organizations and others have expressed concerns regarding the effectiveness of the *Competition Act* provisions dealing with pricing practices and the Bureau's enforcement of them. Most recently, these concerns were raised in the context of Bill C-235, a private member's bill which proposed to amend the *Competition Act* with the objective of better addressing certain forms of anticompetitive pricing activities. The Bill targeted integrated suppliers charging higher prices to independent retailers than the prices at which they sold the same product at retail. Though the Bill has not been passed by Parliament,[3] the discussion surrounding it vividly illustrated the level and nature of concerns in various sectors of the Canadian economy relating to pricing activities. As a consequence of its consideration of the Bill, the Standing Committee on Industry resolved to review the pricing provisions of the *Competition Act* and their enforcement.

In anticipation of the Industry Committee's review, in June 1999, the Commissioner engaged the authors of this report to conduct an independent study of the provisions of the *Competition Act* dealing with anticompetitive pricing and their enforcement by the Bureau. The full text of the authors' mandate is set out in Appendix 1. This report sets out the results of our study.

Scope of Review

Part I of this study is an examination of the economic nature of the main types of anti-competitive pricing practices regulated under the *Competition Act*, price discrimination, predatory pricing and price maintenance, considering the theoretical and empirical literature on these practices. The purpose of Part I is to identify the basic elements of an appropriate competition policy framework to address anticompetitive pricing practices, including both the criteria needed to identify the anti-competitive aspects of pricing practices and the elements of a legal regime capable of providing relief from such practices in an effective manner. In doing so, the challenges to competition policy posed by the dynamic changes currently taking place in the Canadian economy are considered.

In light of the elements of a competition policy framework identified in Part I, Part II of the report examines the provisions of the *Competition Act* dealing with anticompetitive pricing practices (the '*Pricing Provisions*"), including their interpretation by the courts and by commentators. For comparative purposes, the manner in which anticompetitive pricing practices are addressed in the United States and in the European Union are described. Part II also looks at the enforcement guidelines issued by the Bureau in 1992 in relation to predatory pricing and price discrimination in light of the identified elements of a competition policy framework.

Part III examines the enforcement history of the Bureau in relation to the Pricing Provisions focussing on the past five (5) years. A sampling of the Bureau case files were studied and extensive interviews were conducted with Bureau staff to develop a profile of the Bureau's experience with pricing complaints. Interviews were also conducted with selected stakeholders who had expressed concerns regarding the application of the pricing provisions. On the basis of this data, the report discusses the Bureau's enforcement activities, including the application of the case weighting criteria used by the Bureau to determine whether and in what manner to proceed with a case. The purpose of Part III is to assess the consistency of the Bureau's enforcement in practice with both the Pricing Provisions and the elements of an appropriate competition policy framework.

In the final part of the report, Part IV, we draw some conclusions regarding the Pricing Provisions and their enforcement and make some suggestions for improvements.

PART I Developing a Competition Policy Framework for Anticompetitive Pricing

Introduction

Section 1.1 of the *Competition Act*[4] describes the purposes of Canadian competition law as follows:

> to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, to expand opportunities for Canadian participation in world markets, to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy, and to provide consumers with competitive prices and product choices.

Section 1.1 has been interpreted by the Bureau as endorsing the principle that competition law is geared to the maintenance and promotion of competition as a process, and not to the protection of competitors.[5] Such an interpretation recognizes that a normal characteristic of competition is that some market participants may not thrive or even survive while others prosper because of their superior competitive performance. This dynamic effect of competition is essential to ensure that the efficiency benefits of competition are realized. Reductions in the number of competitors should be permitted in the interests of efficiency where the survivor is a more efficient competitor, the reduction is not caused by anticompetitive conduct and the marketplace after the reduction in competition remains sufficiently competitive, taking into account potential as well as actual competition. Of course, protecting the competitive process will mean protecting competitors in some situations where they are threatened by anticompetitive conduct or their elimination would result in insufficient remaining competition. Distinguishing anticompetitive conduct from acceptable marketplace behaviour and determining what level of competition is sufficient are extremely difficult.

Because the purpose clause of the *Competition Act* states that competition is to be sought as a way to ensure opportunities for some particular subsets of enterprises, some competitors may legitimately expect broader protection through this law than a single minded commitment to the competitive process based solely on efficiency considerations would dictate. In other words, the purpose clause may be interpreted as expressing an intention to proscribe anticompetitive behaviour, even where the outcome is the removal of a less efficient competitor and sufficient competition remains in the market place. In this way, protecting fair and equitable opportunities for small and medium sized enterprises could lead to difficult tradeoffs with the promotion of efficiency.[6]

In relation to anticompetitive pricing, the challenge of respecting these sometimes competing interests is made more difficult by the evolving understanding of the economic effects and likely incidence of potentially anticompetitive pricing practices. New insights derived from economic theory combined with new empirical evidence regarding actual pricing practices in the marketplace mean that legislators and enforcement agencies must constantly struggle to ensure that competition law rules deal effectively with pricing practices which are destructive of competition. At the same time, they must ensure that rules and enforcement practices do not discourage aggressive competition through ever more efficient market place strategies. Price cutting which is predatory, for example, must be distinguished from pro-competitive price cutting which is beneficial to consumers.

The challenge of designing effective competition law rules is further complicated by changes in the marketplace. Canadian businesses function in an ever more competitive environment created by the increasing globalization of business activity, itself greatly facilitated by the liberalization of national and international rules on trade and investment. Just as competition continues to increase, the way in which businesses operate is evolving at an increasing rate. Some sectors are experiencing radical changes in the way business is done and all sectors are being transformed by technology, though some more than others. In terms of competition law, the challenge is to ensure that the law continues to fulfil its objectives as the markets to which it applies develop.

For all these reasons, the design of effective rules to deal with anticompetitive pricing is daunting.[7] Conceptually, this task requires (1) that one develop correct criteria for identifying anticompetitive activity and (2) that these criteria can be applied to provide remedies in a timely and cost effective way. Most of the remainder of Part I deals with the first aspect, identifying anticompetitive pricing practices. First, it sets out the economic characteristics of the three main types of pricing practices dealt with in this study (price discrimination, predatory pricing and price maintenance), the circumstances in which they are anticompetitive and the existing empirical evidence regarding each type of behaviour. Second, we look at some of the challenges to competition policy analysis posed by the new information economy. Finally, with this background, we turn our attention to the second aspect of the challenge of designing appropriate rules: suggesting the elements of a regime to address the anticompetitive aspects of pricing behaviour and establishing criteria which may be used effectively in practice. Parts II evaluatesthe current provisions of the *Competition Act* and their interpretation by the Bureau based on the analytical framework developed in this part. Part III discusses the Bureau's enforcement experience in light of this framework.

Economic Analysis

Introduction

Most economic analysis of competition policy is concerned with how to protect the competitive process by ensuring that markets function efficiently. The challenge is to design a regime which provides relief where pricing behaviour is actually destructive of efficiency enhancing competition. A pricing practice should be considered anticompetitive, for example, where it creates a risk that future prices and other terms of sale will be less favourable to consumers than they would be otherwise. Pricing practices which are simply part of a competitive process of reducing prices must not be affected.[8]

Even though competition policy is broadly seen as attempting to maintain and promote the process of competition *per se*, arguments developed in support of a particular policy may be motivated not by efficiency concerns but by a desire to protect groups considered meritorious, socially valuable or particularly vulnerable. As noted above, there are echoes of such considerations in the statement of purposes of the *Competition Act*. This significantly complicates any attempt to evaluate the impact of the *Act* and its administration.

We will not deal explicitly with these considerations in the following analysis of the explanations of anticompetitive pricing provided by economic theory because they are largely extraneous to economic analysis, but we will return to them in our assessment of the provisions of the *Competition Act* dealing with anticompetitive pricing in Part II, since such considerations are explicitly mentioned as part of the purpose of the *Act*.

Price Discrimination

Price discrimination means charging different prices to different customers, whether other businesses or final consumers, for the same product where the differences in price do not reflect differences in the cost to the supplier of serving the customers.[9] Three conditions are necessary for a firm to discriminate.[10]

1. The firm must have sufficient *market power* to set price (otherwise customers charged higher prices would choose to purchase from a competing supplier).
2. The firm must be able to identify different classes of customers with *different levels of sensitivity to the price* of the product, or, more precisely, different price elasticities of demand. These differences may arise because of different needs, income levels or uses of the product.
3. There is *limited opportunity for customers to resell to each other*. It must not be possible for customers paying a low price to sell to those for whom the product is priced more expensively.

Three different forms of discrimination are discernable.[11]

1. *First degree discrimination*, also known as perfect discrimination, in which each unit is sold for the highest possible price each buyer will pay. Perfect discrimination is unattainable in practice, since it is impossible for the seller to identify and exploit very small distinctions in preferences between customers.
2. *Second degree discrimination*, in which demand is partitioned into a number of blocks based on the quantity customers prefer to purchase with different prices being charged for each block (*i.e.* quantity discounts).
3. *Third degree discrimination*, where, based on differing price elasticities of demand, buyers are partitioned into different groups with a price set separately for each group. For example, automobile manufacturers may levy different product markups across product lines, posting the highest markup on luxury vehicles.

Empirical evidence confirming the existence of each form of discrimination can be found relatively easily.

Discrimination approaching first degree price discrimination by American colleges was found by Tiffany and Ankrom.[12] Wilson provides several examples of second degree price discrimination, including electrical tariffs varying with hours billed.[13] Third degree discrimination was analysed by Rosenbaum and Ye[14] in a study showing how economic journal publishers use discriminatory pricing with different subscription rates for institutional versus individual subscribers.

Indeed, price discrimination is commonplace.[15] A major bank is engaging in discriminatory behaviour when it offers no fee banking services to students in order to gain their future loyalty. Major software companies like Microsoft might be considered to be discriminating if they tacitly consented to software piracy in the residential market but actively prosecuted piracy by commercial customers. Slive and Bernhart[16] suggest that the drive of a software company to have its product become the industry standard makes acquiescence to piracy by individual consumers (some of whom are also decision-makers in major corporations) a marketing strategy based on discriminatory pricing.

There are a variety of non-price techniques that can be used to effect price discrimination indirectly through non-price requirements. A classic example is the case of tied sales. At one time, IBM had a monopoly on certain types of tabulating equipment. Different customers valued IBM's equipment quite differently based on the amount that they used the equipment. However, instead of using price discrimination to get the maximum price that each customer was willing to pay, IBM forced customers to buy tabulating cards from the company, and by charging a price for tabulating cards in excess of their cost, IBM was able to discriminate among its customers according to the intensity of their use of the equipment. Block booking and commodity bundling are other examples of non-price requirements imposed by sellers that succeed in enforcing effective price discrimination.

Price discrimination is not inherently anticompetitive. Indeed, it is very difficult to determine simple indicia of anticompetitive price discrimination. Much depends on the circumstances of each case. Often discrimination may be preferable to a situation in which discrimination is not practised. As noted, in order for discrimination to be possible in economic theory, the discriminating firm must have sufficient market power to set prices and force different persons or groups to pay a higher price than the competitive price. Thus discrimination implies the ability to set prices at a supra-competitive level. The appropriate benchmark for assessing price discrimination is not the competitive price, but the price which the discriminator would charge if it could not discriminate.

If price discrimination simply results in expanding a market, an increase in welfare will result. If we assume that some groups of consumers would not ordinarily purchase any product at the price a nondiscriminating seller would charge if it was restricted to a single-pricing strategy, these groups would be better off if the seller was willing and able to sell them product at a lower price. Price discrimination of this kind can increase total output and welfare.[17] The low price buyers are better off and those buying at the price which would otherwise be charged are no worse off.

Discrimination may allow a price discriminating firm to extract a much larger portion of the consumer surplus than what would be the case if discrimination were not permitted. To the extent that the discriminator charges more than it would if discrimination were prohibited, discrimination will impose a loss on the consumers paying the higher price. This loss is transferred to the price discriminator, however. It is not a dead loss to society. How one views the distributive effect will be affected by various factors, including whether the discriminator also discriminates by selling below the price it would charge in a single price world and whether there are efficiencies associated with the discrimination. For example, through discriminating, the discriminator may be able to expand production to a more efficient level. In short, the consequences of the discrimination are difficult to characterize in the abstract.[18]

Charging different prices to different customers may be justified in certain circumstances, in which case it is not truly price discrimination. A transaction or information cost difference associated with selling to different customers, will justify charging them different prices. So, for example, charging more to a customer buying low volumes, or less to a high volume buyer may not be discriminatory where the volume discount is justified by cost differences. Differences between the prices a supplier charges to affiliated and non-affiliated distributors may be justifiable on a cost basis, if the transactions costs of dealing with non-affiliated distributors are higher. In a similar way, if different prices are charged at different times, as a result of changes in input costs or demand shifts, or price differentials are transitory, perhaps because they are responding to price changes by a competitor or other market exigencies, the differences are not discriminatory.[19]

Discrimination may be anticompetitive if it is engaged in as part of a policy of predatory pricing, where the object is to eliminate or discipline a competitor or deter market entry. This particular form of discriminatory pricing is discussed in the next section.

In some circumstances, price discrimination may be induced by buyers. There are at least two variants of such discrimination. A customer may demand that a supplier charge higher prices to another customer with whom it competes, perhaps because it is unhappy about the low pricing policy of the second customer. Alternatively, a large customer with market power may be able to extract special non-cost justified discounts from a supplier, putting competitors of the customer at a competitive disadvantage. Concerns about this second form of buyer induced discrimination was the main reason for the introduction of the Canadian price discrimination provisions in 1935.

The likely incidence and effect of discrimination of the second situation type has been questioned by some commentators.[20] Dunlop, McQueen and Trebilcock have expressed skepticism regarding the advantages to a large customer of extracting large, non-cost justified discounts from suppliers. They argue first that, where the supplier market is competitive and supplier profit margins are low, large non-cost justified discounts to a large customer may threaten the existence of weaker suppliers. If suppliers leave the market, the resulting concentration at the supplier level is not in the large customer's interest. Their second point is that, if suppliers grant large discounts to one large customer, it may signal the benefits of bargaining and encourage other customers to seek such benefits. It may even draw new large customers from other markets. Such consequences would significantly reduce the benefit to the large buyer of seeking the discount in the first place.[21]

In terms of competitive effect, if new players enter the large customer's market and successfully obtain the same discounts, the result may be a general lowering of costs to and greater competition amongst firms in the large customer's market. As a consequence, consumers may benefit from lower prices and increased sales.

Where price concessions are sought by a large customer, there may be anticompetitive effects in the market in which the customer sells. Vigorous price competition in that market by the other customers of the discriminating supplier will be constrained because they will be at a competitive disadvantage relative to the large customer. The nature of the competitive impact will depend upon whether adequate competition remains in the market.

Based on the foregoing discussion, economic analysis does not disclose discrete factors which are sufficient to determine when price discrimination is anticompetitive. In order for price discrimination to occur the discriminator must have market power,[22] meaning, in part, the absence of opportunities for customers to change suppliers. As well, customers must not be able to engage in arbitrage by reselling to each other. Price differences justified by differences in transaction or information costs of supplying different customers are not discriminatory. Nor are price differences which are a temporary expedient or a defensive competitive response.

Any competition law provision designed to address anticompetitive price discrimination should be restricted to price discrimination thus defined. Some competitive effects test will also be necessary because the existence and nature of any anticompetitive effect will depend upon the particular circumstances in which discrimination occurs in each case. Assessment of the competitive effects of discrimination will be difficult, imposing a need for significant data and difficult microeconomic forecasts of demand and other variables.

Predatory Pricing

Predatory pricing occurs where a firm temporarily charges particularly low prices in an attempt to deter market entry by new competitors, to drive out existing competitors, or to discipline competitors.[23] By setting very low prices in the face of a new competitor, an incumbent firm can prevent market entry. Either the threat of a low pricing policy or the reputation of the firm for predatory behaviour can be sufficient disincentives to deter new market entrants. When predatory pricing is undertaken to discipline competitors, the behaviour is intended to demonstrate the ability of the dominant firm to inflict losses on unruly competitors, who may themselves be engaged in price cutting or other practices that the dominant firm may be concerned about. In all these cases, the predator incurs temporary losses during its low pricing policy with the intention of raising prices in the future to recoup losses and gain further profits. Determining when predatory pricing has occurred is complex and difficult. The main problem is that low pricing is commonly complained about by firms struggling to compete but it is hard to distinguish predation from aggressive competition.

Prior to the 1980's, predation was regarded by economists as likely to be rare. This view was based on the assumption that to become an economically rational strategy for a firm there must be a reasonable prospect of recouping losses after a successful low pricing campaign and that prospects for recoupment are low in the absence of high barriers to entry. If high prices were charged by a supposed predator after successfully eliminating or deterring competitors from entering a market with low barriers to entry, others would enter to take advantage of the high prices and the price would not be sustainable. Likely new entrants might include the market participant who had exited or someone else who had acquired their plant and equipment.

McFetridge canvasses a variety of other theoretical arguments which have been made suggesting that predation is unlikely. Significantly, predation is a very expensive strategy. Not only must the predator finance losses on the sales that it would otherwise have made, it must also service the increased demand generated by its below cost pricing, which, in turn, increases the losses it incurs. If the victim knows that predation is costly for the predator and that the predator will be able to make supra-competitive profits if it leaves the market, the victim has an incentive to either stay in the market until the predator inevitably gives up or try to negotiate with the predator to buy it out. Indeed, the prospect of such a buy out should attract capital market participants to invest in the victim, allowing it to hold out until such a buy out offer is made. Customers and suppliers of the predator and the victim have an incentive to prevent the successful development of the predator's monopoly and may assist the victim to survive.[24] Where capital markets operate in such an efficient manner, likely it would be cheaper for the prospective predator to buy out the victim up front than to engage in predation and then buy out the victim.[25]

More recently, some sophisticated theoretical claims have been made suggesting a wider array of circumstances in which predation may be a rational strategy. These claims are based on models which acknowledge that information and capital markets are not perfectly efficient. The predator and the victim will not have complete information regarding each other and the victim may not have access to sufficient capital to survive the period of predation.

The likelihood of successful predation is claimed to be enhanced under the so called "long purse" theory. Under this theory, predation is more likely to be successful where the predator has better access to capital than the victim. Creditors of the victim will terminate funding or refuse to advance additional funds needed to finance the losses arising during the period of predation due to the weakening of the victim's financial position caused by the predation. Since predation will also hurt the financial performance of the predator, at least during the period of predation, the predator must have sufficient financial resources to avoid problems with its own creditors.[26] In order for there to be such differential access to credit, capital markets must be imperfect. Otherwise, as suggested above, the victim should be able to obtain financing to survive the predatory campaign.

Once "long purse" predation has eliminated current market participants, an explanation must be provided as to why recoupment is possible.[27] The most common theoretical claim is that predation is used to create a reputation for toughness which deters future entry, allowing the predator to recoup its investment in predation.[28] Predation is less costly because, in effect, initial acts of predation insulate the predator from competition by creating a strategic barrier to entry in the market. Since the cost of predation is reduced while the prospects for recoupment are enhanced, predation should be more likely. This explanation is most compelling in circumstances where the predator is active in multiple markets. If predation in one market creates a reputational barrier to entry in all markets in which the predator participates, the predator may be able to engage in supra-competitive pricing in all markets after a successful predatory campaign in one of them.

Rasmussen[29] and others have suggested other theoretical scenarios for predation based on signalling and signal jamming. Incumbent dominant firms may successfully predate by sending signals about the profitability of entering a market which creates a barrier to entry. Lowering price upon entry may be interpreted by prospective entrants as a signal either that demand is weak or that the predator's costs are so low that they can afford to reduce prices. In either case, the intended message may be that there is no prospect of profitable entry. An identical price response by an incumbent firm may be used to send false signals. A firm may lower prices to a level below its costs even when demand is strong in order to falsely signal that demand is weak or that its costs are lower than they actually are. Such "signal jamming" may be used to keep firms from entering the market by making profitable entry appear more difficult or impossible.[30]

The plausibility of profitable predation on any of these theories depends upon certain assumptions being fulfilled. In general, the managers of the predator must have incentives to engage in a predatory strategy if the reputation for predation is to be credible. This will mean that their compensation is not linked to short term share value and that they will be protected against losing their jobs during the unprofitable predation period. In a recent study of U.S. firms convicted of predation, Lott concludes that there is no evidence of the management incentives or entrenchment necessary for the theoretical claims to be plausible.[31] He found, instead, that firms accused of predation tied management compensation to short term profits. Nevertheless, to the extent that pricing decisions are made outside the management group or are not effectively monitored by management, this conclusion does not negate the possibility of predatory strategies being adopted.

The effect of pricing will depend upon its relationship to the costs of current and potential competitors of the predator and its expected duration. In order to discipline a competitor, a predator may need only to drop the price substantially for a short period. It may not need to drop prices below the competitor's costs to discipline the competitor for discounting or engaging in some other practice that the predator does not like. In order for predation to successfully put a competitor out of business, however, prices may need to be pushed down to a level below the competitor's cost and be maintained at that level for some time. Similarly, in order to deter entry, the potential entrant may need to believe that prices will be below its cost. If the price is above its average total cost, a market participant may still make profits and there will be an incentive to enter. Pricing below a participant's average variable cost will mean there is no incentive to enter and, in the absence of barriers to exit, will cause existing participants to exit. When the price charged falls between average total cost and average variable cost, the effect will depend upon other circumstances in the market.

Nevertheless, even though the effect of predatory pricing is a function of the costs of competitors of the predator, pricing can only be considered predatory where it is below some measure of the *predator's* cost. Where the predator's costs are lower than those of its current and potential competitors, even a price below the competitor's average variable cost may be profitable, even profit maximizing, for the predator.[32] Preventing the alleged predator from taking advantage of its lower cost structure would punish the efficient. Consequently, tests for predation focus on the predator's costs.

The rule suggested by the prominent U.S. antitrust scholars Areeda and Turner is the most noteworthy attempt to formulate a price/cost rule. They assert that a price at or above marginal cost is not predatory and that a price below marginal cost is predatory.[33] Because of the difficulty in measuring marginal cost, Areeda and Turner suggest average variable cost as a proxy in most circumstances.[34] Others argue, however, that prices between average total cost and average variable cost may be predatory. Joskow and Klevorick[35] suggest that, where prices are in this "grey zone," predation may occur where the alleged predator is dominant and the barriers to entry are high enough that post-predation recoupment is feasible. Joskow and Klevorick also suggest that consideration should be given to the dynamic effects of competition on costs including the effects of changing technology. In short, cost evidence alone, typically, is not conclusive when price is in the grey zone.

There may also be business justifications for pricing in the grey zone which are not predatory. Under normal competition, prices may fall below average total cost when firms are seeking to enter a market or expand, where demand is declining or growth is slower than expected or there is excess capacity in the market.[36] As well, it is quite naive to presume that an incumbent firm should sit passively in the face of a new aggressive entrant. More reasonably, one may expect the incumbent firm to increase output and reduce prices as a way to prevent its market share from being eroded.

Williamson suggests an output restriction rule focussing on the behaviour of the dominant firm when new firms enter the market as a test for predation.[37] He suggests that if post-entry output levels are higher than pre-entry levels, the dominant firm has acted in a predatory way. This is a practical rule in the sense that it is easy to determine if a firm has expanded output, but it is debatable whether the simple fact of reacting to new entrants by putting the pressure on is a satisfactory test of predatory pricing given the business rationales for doing so described above.

Some commentators[38] have suggested that evidence of intent is useful to distinguish true predation from procompetitive price cutting. The difficulty with such an approach is that it is often impossible to produce reliable evidence of intent. On the one hand, the language of the market place is not precise and aggressive competition may be expressed in language which sounds predatory. On the other hand, sophisticated business people may be able to disguise intent effectively. It will often be the case that no intent evidence is available. Because of these concerns, other commentators have disputed the value of intent evidence.[39]

A final consideration relating to the anticompetitive effect of predation is that the magnitude of the effect will depend on the degree to which a competitor who is eliminated contributed to competition in the market. Where the eliminated competitor contributed to competition in a significant way, such as by being especially vigorous, efficient or innovative, its elimination by below cost pricing by a predator, would increase the loss to society associated with the predation.

Few would disagree that predation is anticompetitive in its effects, but its existence in practice is often debated. In a recent U.K. study, over a 10 year period, it was found that only six (6) cases of predation were initiated and in just three (3) was anticompetitive conduct found.[40] One must be somewhat careful about inferring the absence of predatory activity from such studies, however. An absence of cases, may reflect the allocation of enforcement priority to other types of anticompetitive behaviour, evidentiary challenges in assembling a predation case, problems in designing effective legal rules to address predation or some combination of these factors.[41]

Prosecutions and private litigation based on allegations of predation are more plentiful in the United States. Nevertheless, in a review of U.S. court cases in which companies have been successfully prosecuted, some commentators have concluded that many firms had been wrongfully convicted even using a relatively relaxed test for predation: any pricing below average total cost.[42] Other studies of individual cases, however, have concluded that predation occurred.[43]

To summarize, the basic indicators of predation may be identified as follows, though none is conclusive.

1. Market power defined by reference to market shares and barriers to entry. In the absence of market power, the prospect of recouping the costs of a predatory campaign is small.

2. A policy of selling at prices below some measure of the predator's cost.
    (A) Where sales are at prices below average total cost and the predator has no pro-competitive explanation, such as
        (I) meeting competition or changes in demand conditions; or
        (II) excess supply.
    (B) Where sales are at prices below average variable costs.

3. Evidence of predatory intent.

This simple listing raises but does not address, the challenge of how each of these indicators may be used in practice. While it is simple to state that market power is needed to make predatory strategies credible, the assessment of market power is inherently problematic. To begin with there are complex issues associated with determining the relevant product and geographic market. As well, while categories of barriers to entry may be readily identified, such as sunk costs and economies of scale, how precisely they may be measured and how to evaluate them is the subject of debate. When are sunk costs high enough to constitute a barrier to entry? Should sunk costs arising from efficiencies of the dominant firm be counted? More difficult still are assessments of barriers derived from slippery concepts such as reputation.

Even an assessment of costs is difficult. In principle, the relevant costs should be the anticipated marginal costs of the predator throughout the period of predation. Given the difficulty of determining marginal costs in practice, average variable costs are often used as a proxy. Even average variable cost, however, may be difficult to ascertain in practice. In U.S. judicial decisions, the determination of costs has been described as more difficult than the market power analysis.[44]

Finally, as noted previously, evidence of subjective intent to predate is both hard to come by and often ambiguous. Though some have suggested it is the only way to distinguishpredation from competition, its reliability is questionable and so, as an independent basis for imposing liability, it is often deficient. In some cases of true predation, it will not be obtainable. In cases where there is no prospect of recoupment, intentional predation will not have an adverse effect on consumers. Indeed, consumers will benefit from low prices during the unsuccessful predatory campaign. The only risk is that an effective competitor in the market will be eliminated.

Price Maintenance

Price maintenance occurs where a firm tries to set a minimum price at which another firm can sell its product. It is one of the most pervasive restraints in the market place.[45] Resale price maintenance may take place vertically, such as between a wholesale supplier and a retailer which resells the supplier's products. It may also be part of a horizontal arrangement between competitors who agree to impose resale price maintenance on resellers of their products.

The economic rationale for prohibiting vertical resale price maintenance under competition law is that it lessens competition by restricting the ability of the retailer to compete on price. It leads to higher prices for consumers and higher margins for retailers, and, in the process, protects inefficient retailers that would not prosper in a truly competitive environment. Resource misallocation may also result where retailers direct excessive resources to non-price competition, such as attention from sales staff, delivery speed and after-sales service. In the absence of price maintenance, competition would be more likely to eliminate less efficient retailers and lead to price and cost reductions in the long run.[46] Where price maintenance is implemented by a supplier solely in response to pressure from one of the supplier's large customers seeking to eliminate the low pricing policies of competitors of the customer, the only purpose may be to protect the large customer from price competition.[47] On the other hand, efficiency is typically served by freedom of contract and many commentators have suggested that vertical resale price maintenance should be permitted, at least in some circumstances.

Horizontally, price maintenance is anticompetitive where it takes the form of an agreement among suppliers to fix their prices. Where suppliers agree not to fix their own prices but to impose resale price maintenance, the anticompetitive effects are also easily identified. Competition among customers is effectively precluded. As well, the practice reduces uncertainty in the market and facilitates collusion among suppliers. In the absence of price maintenance, competing suppliers are uncertain whether low retail prices reflect the decisions of competitors or retailers, and therefore have greater incentive to lower their own prices. In an environment of price maintenance, one would expect suppliers to reach joint profit maximizing levels because they know that retail prices reflect competing supplier prices rather than lower prices resulting from retail competition.

Why do businesses engage in price maintenance?[48] There are at least three common types of economic rationales suggested.

First, in relation to purely vertical price maintenance, several efficiency explanations are possible. Suppliers may want to encourage resellers to compete on demand determinants other than price, such as service. The retail market may not provide the optimal level of service the supplier desires because of a "free rider" problem. Discount shops may free ride on the efforts of full-service retailers that provide important pre- and post-sales service on technically complex products such as computers or electronics. Resale price maintenance ensures that resellers have an incentive to offer important consumer services because they are precluded from competing on price.[49]

Suppliers' incentive to engage in this practice would have to be based on a belief that the increase in demand resulting from enhanced service would more than offset the reduction in the level of demand associated with the higher maintained price. While service levels may be specified in a contract, resale price maintenance may have lower transaction and monitoring costs and, consequently, be more efficient.[50]

Another efficiency explanation is that suppliers, such as those in the designer clothing industry, may want to maintain a certain image of their product, which can be damaged by the item being discounted or used as a loss leader. Again, the supplier must be able to conclude that the prestige associated with the higher price means that preventing discounting is profit maximizing. Suppliers may also introduce resale price maintenance to encourage resellers to expand the number of outlets, to provide retailers with an incentive to promote a supplier's product or to ensure retailers sufficient margins to cover the retailers' cost of quality certification for the supplier's products.

A second type of rationale is that a cartel among suppliers may be facilitated by an agreement to impose resale prices. By fixing resale prices, monitoring the cartel agreement on wholesale prices would be facilitated, especially where wholesale prices themselves could not be observed easily. As well, suppliers may enter into a cartel for the sole purpose of fixing resale prices as discussed above. A third rationale is that resale price maintenance could be a feature of a cartel at the resale level. Retailers threatened by the entry of discounters may band together to get suppliers to fix resale prices to prevent successful entry by discounters. Marvel and McCafferty describe how the National Association of Druggists in the United States, an ardent proponent of price maintenance, instructed its members to put one supplier, Pepsodent, "under the counter" when the company discontinued price maintenance in California. As a result, Pepsodent virtually disappeared in California and saw its sales drop by 40 per cent nationally. Pepsodent responded by re-instituting price maintenance.[51]

On the basis of their recent study of price maintenance in the United States, Deneckere, Marvel and Peck aptly state that, "...resale price maintenance has the curious status of being both *per se* illegal and widely practised."[52] Nevertheless, there is a dearth of empirical evidence on the competitive effects of resale price maintenance which has been lamented by those who concern themselves with its study.[53] The existence of price maintenance is not in doubt, but its welfare effects are in question. This is largely because of the numerous reasons for which price maintenance is employed.

In their work described above, Marvel and McCafferty argue that price maintenance is anti-competitive when it is used by manufacturers to gain or maintain monopoly power through control of the distribution system.[54] Empirical studies, however, suggest that price maintenance associated with such cartels is rare. This is the conclusion reached by Ippolito in her analysis of price maintenance cases brought before the American courts from 1976 to 1982.[55] Although her review of the evidence found that no single theory was capable of explaining price maintenance activities, her study suggests that purely vertical agreements between suppliers and customers are most common and, consequently, there was scope for the efficiency explanations provided by the service enhancement, brand image and other theories. Competition authorities must be capable of unpacking the various uses of price maintenance in particular cases to identify and measure the anticompetitive effects, including their effects on efficiency.

While all horizontal price maintenance arrangements may be anticompetitive, the determination is more complex for purely vertical arrangements because a determination must be made as to what consumer welfare would be in the absence of price maintenance. Nevertheless, it is possible to identify some of the economic indicia of anticompetitive vertical price maintenance as follows:

1. The person implementing price maintenance (the "*Supplier*") has market power, a characteristic of which is limited opportunities for customers to change suppliers;

2. The Supplier does not have an efficiency based justification, such as a desire to increase service or prevent brand impairing practices, which would include loss leadering or misleading advertising; and

3. The Supplier was induced to implement price maintenance in relation to one customer by another customer who competes with the first.

As the foregoing discussion indicates, the presence of factors 1 and 2 are necessary conditions for price maintenance to have an anticompetitive effect, though the significance of the effect will depend upon the particular circumstances in each case, imposing a need for significant data and difficult microeconomic forecasts of demand and other variables.

Resale price maintenance induced by a large customer, referred to in factor 3, will have an anticompetitive motive where no efficiency justification described in factor 2 is present. Nevertheless, a large customer will only be able to coerce a supplier into implementing price maintenance if the customer has market power itself. Also, resale price maintenance in response to pressure from a large customer will only have an adverse impact on the customer whose prices the Supplier seeks to maintain if factor 1 is also present. Where a supplier does not have market power but, price maintenance is imposed on all suppliers in an industry by a cartel of suppliers or retailers, the result could be anticompetitive.

Challenges of the New Economy

The Canadian economy has become increasingly competitive as a consequence of globalization, due, in part, to the ongoing process of trade liberalization. As well, in certain sectors the channels of distribution have substantially changed. The emergence of "big box" retailing and internet distribution are both a response to and a cause of increased competitiveness. Even more fundamentally, the economy is currently undergoing a radical transformation; it is becoming more and more knowledge-based and increasingly innovation-driven. These features of the new economy may require a rethinking of competition policy in relation to anticompetitive pricing.

The old economy was driven by manufacturing and tangible commodities and was focussed on the allocation of existing material resources. The new economy is knowledge-based and technology-driven; it is geared to innovation, to the creation of new use-values, products and services.

Competition in the new economy is distinguished from the old by the pace of technological change. Formerly, many firms tended to take their milieu as given; technologies, institutions, preferences as fixed. They tried to optimize its results within this context by choosing the "right" technology and the "right" product mix. In many sectors, the role of innovation was relatively small.

Today competition in most sectors has grown due to globalization and accelerated technological change, forcing enterprises to embody a philosophy of continuous improvement and innovation, to become learning organizations in order to remain competitive. To do so, they require an organizational flexibility that they did not previously possess.[56] Increasingly, learning is the source of wealth-creation and in order to maximize learning opportunities, firms must engage in higher degrees of cooperation. The new economy depends on new modes of collegiality, alliances and sharing of knowledge among firms.

In terms of competition policy, increased competition and technological change mean that, more than ever, efficiency must be considered from a dynamic point of view.[57] The impact of behaviour on efficiency must be assessed in light of the continuous change generated by intensified competition and innovation which characterizes some sectors, such as information technology.[58]

At the core of the new economy are certain principles which may have profound implications for competition policy.

1. *The centrality of technological change to economic growth.*

Although it is not a new belief that technological change drives economic growth,[59] the increasingly rapid pace of technological developments is reinforcing and entrenching the place of technology at the economic centre of growth. This leads to recognition of the importance of innovation to economic growth, and, correspondingly, the significance for public policy of ensuring the optimal conditions for innovative activity. Competition policy must now give more serious consideration to the role of innovation as the lifeblood of the economy.[60]

Recognition of the interplay between innovation, economic growth, and competition policy began to appear in the United States in the mid 1990's.[61] Recently speeches made by heads of the antitrust divisions of both the Department of Justice[62] and the Federal Trade Commission[63] confirm this approach. The importance of innovation is also being recognized in Canada,[64] but, unfortunately, the *Competition Act* does not consistently permit such considerations to be addressed.[65] The Competition Bureau has dealt with some aspects of innovation in its *Strategic Alliances under the Competition Act*[66] and the *Merger Enforcement Guidelines*. Intellectual property rights are the subject of the draft *Intellectual Property Enforcement Guidelines* published for comment in June 1999. No overarching policy based on the primacy of innovation has been developed.

2. *Increasing returns and low or zero marginal cost.*

Increasing returns are present when unit costs of production decrease as the firm produces additional product.[67] Increasing returns are characteristic of many sectors in the new economy,[68] particularly in industries like information and communications technologies. Firms in such industries may need to incur massive sunk costs in developing a new product, such as a new software program, but, after the first unit is sold, the marginal cost of supplying an additional unit is equal to, or at least very closely approaches, zero. This implies that the challenge lies not in fulfilling demand, but rather, in *creating* demand for the new product.[69] One need only think of the phenomenal marketing activities of Microsoft prior to the release of Windows 98 to understand this point.

Increasing returns also operate in industries characterized by economies of scale. "Superstores", selling huge volume, benefit from substantial reductions in unit costs the more units they sell. Superstores are able not only to spread their costs over more units but also to obtain large discounts from their suppliers based on the magnitude of their purchasing power. As a consequence, they are capable of turning a profit while significantly undercutting the prices of small independent retail competitors.

3. *Monopoly rents are short-lived or non-existent.*

In order to protect consumers and ensure that competition is maintained, one of the objectives of competition policy is to control the activities of dominant firms which constitute an abuse of their market power. In some sectors of the new economy, however, even a monopolist, such as a firm offering the latest innovation in software, is not likely to retain this position for long and the corresponding need for competition law enforcement is reduced.

Incumbent firms are unseated rapidly as their products are displaced by different products which meet altogether new needs in the marketplace. Because demand is limited in time, incumbent firms are only likely to earn normal profits because demand subsides before sufficient time has passed to reap super-normal earnings.[70]

4. *The new importance of standards*

In the new economy, gaining a large market share quickly as a way to establish the dominance of a standard may be an increasingly common business strategy. Standards are an example of network effects. A network effect occurs when the value of a product increases with the number of users. Software is the classic example. The more people using a particular word processing software, the more valuable it becomes. Where a product becomes an industry standard such network effects are substantial. Where standards become a crucial feature of competition, efforts to establish the dominance of a standard, including the use of low pricing, may be part and parcel of competition.

These four (4) factors may necessitate a re-thinking of competition policy. In relation to pricing practices, legitimate efficiency enhancing competition through low pricing practices is likely to become more pervasive, particularly in industries characterized by high rates of innovation, increasing returns and where the prospect of establishing the industry standard may have substantial benefits. At the same time, again in particular industries, technology is driving down barriers to entry, both through innovations in marketing and distribution, such as internet sales, and by creating low cost ways of participating in business. Publishing is an example of a sector where costs of setting up a business have been dramatically reduced, at least in some niches, by technology. Improved access to information is reducing barriers to entry in all markets. In reducing barriers to entry, technology is expanding the scope of geographic and product markets themselves. When one combines declining barriers to entry with increasing threats to dominance in some markets from new products and technologies, the likelihood that dominance can be exploited to injure competition is substantially reduced.

At the same time, a characteristic of an innovation driven market is that the innovator will be dominant, at least for a time and that there may be efficiencies associated with dominance. Richardson, for example, has suggested that larger firms or even dominant firms may show superior innovative performance due to advantages of economies of scale, as well as valuable cumulative learning experience such firms may have gained through prior innovative successes.[71] It is important that competition law enforcement take into account these aspects of competition in the new economy. This means that competition authorities should increasingly emphasize dynamic over static efficiency goals in their enforcement analysis. Dynamic efficiency recognizes, for example, that innovation is essential to efficiency and that the establishment of a standard may be beneficial to consumers and, in any event, that any standard will not be sustainable in the long term since standards themselves are a significant site of competition.[72]

In the new economy, competition is becoming more, not less, intense. Increasing numbers of small and medium sized independent firms will go out of business, replaced by new firms, many of which will themselves fail. The challenge of accurately identifying and taking enforcement action against anticompetitive pricing behaviour will become more daunting and the Competition Bureau will need to be vigilant to ensure that its enforcement policies are both informed by and sensitive to the exigencies of the new economy.

General Considerations Regarding a Competition Policy Framework for Anticompetitive Pricing

Creating substantive rules and procedures to ensure that effective remedies are provided for anticompetitive pricing practices is challenging. As discussed above, such practices raise difficult issues in terms of how to distinguish behaviour which is destructive of competition from that which is efficient and procompetitive. Even if you are able to define appropriate criteria for determining the behaviour against which action should be taken, there remain substantial additional problems relating to how to take enforcement action against it. Gathering evidence as well as creating procedures which will give timely and appropriate relief in a cost effective way are very difficult.

In this section, we focus on the first set of challenges: designing rules to identify anticompetitive pricing practices. The other issues we will take up in the balance of the report.

The central debate regarding the design of competition law rules is what behaviour should be simply prohibited *per se* as opposed to dealt with on the basis of all the circumstances of each particular case to determine if there is, in fact, an anticompetitive effect, sometimes referred to as a rule of reason approach. A rule of reason approach examines and balances various factors relating to the competitive effect of an activity to determine if the activity is an unreasonable restriction on competition. Such an approach requires a determination of the relevant market and a consideration of its structure and competitive conditions, including barriers to entry, in order to ascertain whether the person engaged in the activity has market power. Such an approach also requires an assessment of the purpose and effect of the activity as well as any efficiency based explanations for it.[73] Before discussing what type of approach is appropriate for dealing with anticompetitive pricing, it is useful to make some general observations on the choice between the *per se* and rule of reason approaches.[74]

A *per se* approach has certain advantages. It provides clear guidance to business people, consumers and their advisors regarding what is prohibited, allowing them to readily comply with the law and to seek relief when it has been violated. A *per* se approach also facilitates enforcement activity because the elements of the behaviour which must be proved are clearly set out and do not depend upon complex and ultimately contestable microeconomic arguments regarding the effect on competition.

The main disadvantage of a *per se* approach is that it tends to be either under or over-inclusive or both. The difficulty of defining precisely the type of behaviour to be prohibited means that*per se* rules will often not catch all anticompetitive behaviour, will sweep in behaviour which is procompetitive or both. The latter is a more serious problem, not only because it punishes precisely the behaviour that competition policy seeks to promote, but also because it has a chilling effect in the market place. It discourages all businesses from engaging in procompetitive behaviour where there is a risk that they will contravene the law.

The over and under inclusion problem is largely resolved by the rule of reason approach which requires an intensive enquiry into the effect on competition before any behaviour is found to be contrary to the law and a remedy available. The result should be a more accurate assessment of what behaviour is anticompetitive and the chilling effect on procompetitive activity should be substantially attenuated. At the same time, of course, the certainty with which business people and their advisors can know whether particular behaviour will be the subject of successful enforcement action is substantially reduced as well. In addition to its lack of predictability, the rule of reason approach is much more expensive, since data on costs, output and profits and microeconomic forecasts of demand and other variables will be produced by both sides in any proceeding and the adjudicative process, inevitably, will be complex and drawn out.

The choice between these two approaches in relation to a particular category of behaviour must depend, in part, on the plausibility of creating relatively accurate bright line *per se* rules. This in turn depends upon the economic understanding of the behaviour. In circumstances where a particular behaviour may be either pro or anticompetitive depending on the circumstances, it is hard to justify a *per se* rule. As the economic understanding of anticompetitive pricing practices has evolved, it is now clear that in many cases there are procompetitive explanations for price discrimination and price maintenance and it is difficult to distinguish procompetitive price cutting from predation. The very fact that our economic understanding is continuing to evolve counsels against a *per se* standard. Also, a rule of reason approach would permit competition law adjudication to take into account the changes taking place in the Canadian economy including their differential impact on various industries. Moving to a rule of reason approach is consistent with the long term trend here as well as in the United States.[75]

In the Canadian context, a second general issue in connection with designing competition law rules is whether anticompetitive conduct should be a criminal offence or subject to a civil sanction, that is, subject only to an order of the Competition Tribunal prohibiting the anticompetitive conduct or otherwise seeking to restore competition. Given the uncertainty associated with the rule of reason approach, applying it where the consequence may be a criminal conviction with the associated stigma seems inappropriate. To this consideration, one may add the practical observation that it is extremely difficult to prove the conclusions of economic analysis required under a rule of reason approach to the criminal standard of proof, beyond a reasonable doubt.

There are several other factors in favour of a civil approach. Price discrimination, predation and price maintenance are not inherently criminal activities. None involves the moral turpitude associated with conspiracy or bid-rigging. Traditionally, the constitutional basis for the federal government's competence to legislate competition law has been its criminal law power and, as a consequence, when they were created originally the legislative provisions dealing with anticompetitive acts made them criminal offences.

More recently, the courts have adopted a broader notion of scope of the criminal law power and acknowledged that federal jurisdiction in relation to competition law may be found under its authority to enact laws relating to trade and commerce as well.[76] Now there is no impediment to dealing with anticompetitive pricing as reviewable under the civil approach.

A practical reason for doing so is that the civil burden of proof is on the balance of probabilities. Such a burden is much more appropriate, given the inherently contestable nature of rule of reason cases, than the more absolute criminal law burden. As well, the Competition Tribunal includes economic experts with the requisite skills to make difficult assessments regarding competitive effect. This may be particularly important in relation to predation, where the line between anticompetitive low pricing and aggressive competition is a fine one.

Finally, dealing with anticompetitive pricing civilly would add a measure of consistency in the way in which alternative kinds of business strategies are dealt with. There is no obvious reason for dealing with vertical pricing practices criminally, while subjecting other anticompetitive practices occurring in a vertical context to civil review only. Such an argument is most compelling with respect to price discrimination. There are non-price strategies which are functionally equivalent to price discrimination which are only reviewable civilly, either under the abuse of dominance provision or one of the discrete civil provisions. Tied selling and other non-price adjustments to the terms of trade may be used as an alternative to price discrimination to increase the costs to particular purchasers.

Notwithstanding the general advantages of a rule of reason approach, to the extent that there are specific aspects of price discrimination, predation or price maintenance which may be identified using bright line criteria as being never anticompetitive, or always anticompetitive, a *per se* approach is indicated in the interests of predictability and certainty. The economic analysis set out above suggests that few aspects of each category of pricing practice may qualify for such treatment.

With this background, in Part II we review the existing provisions of the *Competition Act* dealing with anticompetitive pricing, discussing both the provisions themselves and the limited case law considering them, as well as the Bureau's published enforcement guidelines for price discrimination and predatory pricing.

PART II *Competition Act* Provisions Dealing with Anticompetitive Pricing

Statutory Scheme of the *Competition Act*

Introduction

There are a variety of provisions of the *Competition Act* dealing with the three types of anticompetitive pricing addressed in this study: price discrimination, predatory pricing and price maintenance. Some are criminal offences. Others are contained in Part VI, the civil part of the *Act*. Where there is a contravention of a civil provision, the Commissioner may apply to the Competition Tribunal for an order prohibiting the person engaged in the anticompetitive behaviour from continuing it. The main requirement for the Tribunal to make such an order is that there be some specified effect on competition. In the following sections of this Part, the law as interpreted by the courts as well as the Bureau's *Price Discrimination Enforcement Guidelines* and *Predatory Pricing Enforcement Guidelines* is set out.

We begin with a general overview of all the relevant provisions of the *Act*. The more detailed discussion which follows is confined to the three criminal provisions dealing directly with price discrimination, predatory pricing and price maintenance and the abuse of dominance provision.

Price Discrimination

The *Act* contains a variety of provisions dealing with situations in which different prices are charged to different customers. Some of these refer to such pricing practices as "discrimination" even thought the economic requirements for true discrimination discussed in Part I may not be present. In the following discussion, we will use discrimination in this broader sense as referring to all situations in which differential pricing is used.

The general price discrimination provision is section 50(1)(a) of the *Competition Act*. Price discrimination by a seller in its sales of articles to buyers purchasing the same quality and quantity and who compete in the same market is a criminal offence in certain circumstances. As well, section 61, the general price maintenance provision, which makes it a criminal offence to refuse to supply a person because of the person's low pricing policy, also makes it an offence to "otherwise discriminate" against a person for that reason. Otherwise discriminating for the purposes of section 61 may include price discrimination.

Several provisions dealing with price discrimination appear in the civil part of the *Act*. Outright refusal to deal with a customer, the ultimate discriminatory act, is specifically addressed in section 75. Relief is available, however, only in certain circumstances, including the inability of the customer to obtain supply from other sources in the market. Under section 76, the Competition Tribunal may order that a seller discontinue a practice of consignment selling where it finds that the practice has been introduced for the purpose of price discriminating. Section 76, unlike section 50(1)(a), extends to "products", not just articles. Under the *Act*, "products" includes services. Discrimination in the form of "delivered pricing" may also be subject to an application to the Tribunal under section 80. Delivered pricing means refusing to deliver articles at a particular location on the same trade terms as the supplier delivers the article to other customers at the same location.

Section 77 of the *Act* deals with certain practices which may involve price discrimination. The Competition Tribunal may make an order prohibiting the practice of granting price concessions to induce a customer to deal exclusively in a particular product or refrain from dealing with a particular product, if certain requirements are met, including the requirement that competition is or is likely to be lessened substantially. Also, where discrimination in the pricing of one product by a supplier is used as an inducement for a buyer to acquire some other product, the supplier is engaged in tied selling and the Tribunal may make an order prohibiting the discrimination where the same competitive effect test is met.

Discrimination may also take the form, not of price differences, but of differential access to promotional allowances. Section 51 makes such discrimination a criminal offence in some circumstances.

Predatory Pricing

Predatory pricing is addressed in section 50(1)(c), which prohibits "unreasonably low pricing" having the effect or tendency of substantially lessening competition or eliminating a competitor or designed to have either effect. Where price discrimination is practised by a seller in connection with its sales in different regions of the country with the same predatory consequences, an offence is committed under section 50(1)(b).

Price Maintenance

Price maintenance is a criminal offence under section 61. The offence is committed regardless of whether the activity designed to maintain prices is engaged in horizontally by one competitor against another or vertically by a supplier in relation to a customer. Refusal to supply because of a person's low pricing policy is also prohibited though certain defences are available. Under section 61(6), any person who attempts to induce a supplier to refuse to supply by imposing such refusal as a condition of doing business with the supplier is also guilty of an offence. Under section 76, the Competition Tribunal may order that a seller discontinue the practice of consignment selling where it finds that the practice has been introduced for the purpose of resale price maintenance.

Abuse of Dominance

Price discrimination, predation and price maintenance may also be addressed under the abuse of dominance provision, section 79, where the requirements of that provision are met. The conduct must be found to be an abuse of market power by a dominant firm with the effect or tendency of substantially lessening competition. Section 78 sets out a non-exhaustive list of acts which may be found to be an abuse of dominant position, some of which refer to pricing practices.

Other Provisions

Certain other provisions of the *Act* are relevant to a discussion of anticompetitive pricing practices, though they are not within the terms of reference of this study. Agreements to fix prices among competitors are prohibited under section 45 where the result is an undue lessening of competition. As noted above, horizontal price fixing may also be addressed under section 61. It was suggested in Part I that market power is required before most pricing practices will have anticompetitive effects. Mergers may create the structural requirements for the exercise of market power and are regulated under the *Competition Act.* Abuse of market power by merging entities in the form of anticompetitive pricing practices might be considered in relation to whether the Commissioner would seek to challenge a merger.[77]

Under section 36 of the *Act*, all the criminal offences under sections 50, 51 and 61 may be the subject of private civil proceedings by anyone who has suffered damages as a result of the commission of the offence. Breaches of the civil provisions, sections 75, 76, 77, 79 and 80, may not be the subject of private action.[78]

Price Discrimination

General Discussion

A criminal prohibition on price discrimination was introduced into Canadian law in 1935[79] following the report of the Royal Commission on Price Spreads in the same year.[80] The main concern of the Royal Commission was that large buyers might be able to use their market power to extract unfairly large discounts from suppliers. The grocery industry was identified as particularly threatened by this type of behaviour. Food suppliers were thought to have been coerced by large supermarket chains into granting large discounts, which gave the chains an unfair advantage when competing with independent stores at the retail level.[81] It was also a time during which small businesses were in decline and large retail chains were developing. The purpose of the provision was to protect small business.[82]

The price discrimination provision reads as follows:

> 50. (1) Every one engaged in a business who
>
> (a) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to the purchaser, is available to the competitors in respect of a sale of articles of like quality and quantity,...
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

> (2) It is not an offence under paragraph (1)(a) to be a party or privy to, or assist in, any sale mentioned therein unless the discount, rebate, allowance, price concession or other advantage was granted as part of a practice of discriminating as described in that paragraph.

The essence of the provision is a prohibition on suppliers granting concessions on price to one purchaser which are not available to competing purchasers of the same article in like quality and quantity.[83] The provision contains some significant limitations. Unlike most of the provisions of the *Act*, it only applies to a "sale" of "articles". Other forms of transactions, such as leases are not included; sales of anything other than an article, such as a service, are not included.[84] As discussed below, however, both may be addressed under the abuse of dominance provision.

For the offence to be established, there must be a sale to a purchaser on terms that, at the time of the sale are not available to a second prospective purchaser who competes with the first. If the purchasers do not carry on business in the same market, such as where one sells to final consumers, while the other sells only to other businesses, no offence is committed. Finally, the price concession must be granted as part of a practice of discriminating. Discounts for particular purposes which occur occasionally and are of short duration, such as those for gaining entry into a new market or to respond to a competitor's behaviour will not likely be considered to be a practice.[85] There must be knowledge of each element of the offence. The supplier must have knowledge that the sale is discriminatory. The Restrictive Trade Practices Commission concluded that this requirement required only negligence in *Mary Maxim Knitting Wool*.[86]

The provision has been the subject of very few criminal prosecutions. There have been only three (3) convictions, all since 1984.[87] In each case, the accused pleaded guilty. One of the factors militating against convictions is that there are many elements, each of which must be proven beyond a reasonable doubt. Despite its apparent ineffectiveness,[88] its possible application has been a significant concern in the business community. In the absence of judicial decisions providing guidance regarding how the provision should be interpreted, the Bureau received many requests for advisory opinions regarding whether certain kinds of pricing practices were consistent with the *Act*. Many commentators have claimed that the uncertainty surrounding the application of the provision meant that it had a chilling effect on pricing strategies with no anticompetitive effect and resulted in unnecessary compliance and monitoring costs.[89] In 1992, in order to provide better guidance regarding its interpretation of the price discrimination provision, the Bureau issued the *Price Discrimination Enforcement Guidelines*.[90] As discussed below, the guidelines have been only partly successful in dispelling the chilling effect associated with the provision even though they are generally perceived as disclosing a relatively permissive interpretation of the provision.[91]

The Competition Bureau raised the question of whether the provision should be abolished in its 1995 Discussion Paper on possible amendments to the *Competition Act*.[92] Abolition was endorsed by the Consultative Panel on amendments to the *Competition Act* in its 1996 Report.[93] The Panel concluded that criminal prohibitions and penalties are inappropriate tools to deal with price discrimination and that the abuse of dominance provision is sufficient to deal with cases of price discrimination which were injurious to competition. The Panel also found that the protection of small business afforded by the provision was overstated, particularly because it permits the granting of volume discounts which will tend to favour large businesses.

Nevertheless, section 50(1)(a) was retained unchanged in the most recent round of amendments which came into force in March 1999. The reason, suggested by the Director of Investigation and Research who was responsible for introducing the amendments, George Addy, was that some small business sectors felt strongly that the provision provided them with protection.[94] Accordingly, it was concluded that the provisions should not be repealed until further study had confirmed whether the claimed protection existed in fact.

Price Discrimination Enforcement Guidelines

The *Price Discrimination Enforcement Guidelines*, published by the Bureau in 1992, purport to set out the Bureau's enforcement policy and its interpretation of the price discrimination provision. The Director's purpose in issuing the *Guidelines* was

> to foster compliance with the law while ensuring that the business community recognizes the legitimate scope which exists, within the law, for the adoption of innovative pricing practices and strategies.[95]

At the time, the approach described by the *Guidelines* was greeted by many in the business community as a welcome lightening of the practical burden imposed by the price discrimination provision. The approach of the *Guidelines* is helpful and moves interpretation of the provision in the direction indicated by the economic analysis in Part I. The *Guidelines* are not binding, however, and compliance does not insulate particular business practices from review by the Bureau, though enforcement action against a practice consistent with the *Guidelines* may be practically unlikely. Perhaps more importantly, the Director's interpretation may not be accepted by a court and so reliance on it where it departs from the wording of the provision may be deterred by the risk of a private action under section 36 of the *Act*.

Prior to the *Guidelines*, the prevailing view was that only volume based discounts were immune from attack under the *Act*. The *Guidelines* indicate that the Bureau would be unlikely to take action against a wide range of other discounting practices taking the form of conditional discounts so long as the conditions of eligibility are the same for all competing purchasers. Conditional discounts are available upon the purchaser fulfilling some condition, such as performing a service for the seller (sometimes referred to as a "functional discount"),[96] or upon the purchaser agreeing to deal exclusively in the seller's products (sometimes referred to as an "exclusive dealing discount") or upon a purchaser increasing purchases over a prior period (sometimes referred to as "growth bonuses" or "fidelity discounts"). The *Guidelines* indicate that none of these are likely to raise issues assuming that they are available to all purchasers who compete with each other. While permitting these sorts of discounts would appear to be consistent with the price discrimination provision, their acceptance represented a significant departure from the enforcement policy in place prior to the release of the *Guidelines*. Growth discounts, for example, had previously been the subject of enforcement action in *R.* v. *Simmons.*[97] The new approach is based on a broader view of the requirement in section 50(1)(a) that discounts and other concessions be "available" to all competing purchasers.

The *Guidelines* make clear that discrimination is only prohibited where it relates to a monetary advantage. The provision of technical assistance, tickets to sporting events and other non-monetary advantages are not caught. The *Guidelines* also clarify the requirements for purchasers to aggregate their purchases through a buying group for the purpose of obtaining larger volume discounts as well as suggesting that the sometimes difficult determination of whether businesses are competitors be based on the rules regarding market definition set out in the *Merger Enforcement Guidelines*. Also the meaning of a "practice" of discriminating is clarified. Significantly, price cuts to meet the competition will normally not be found to constitute a practice. Other issues addressed in the *Guidelines* include how to interpret "like quantity and quality" and when sales are considered to have taken place.

Certain aspects of the interpretive approach in the *Guidelines* appear to depart from the strict wording of the section. In some respects, the approach in the *Guidelines* appears to make the price discrimination provision more onerous than contemplated in the section but in others a less onerous approach is contemplated.

The requirement that discounts and other concessions be "available" is interpreted in a manner which has been criticized as not consistent with section 50(1)(a) and unduly onerous.[98] The *Guidelines* go to some length to provide direction on what "available" means. Where a seller on its own initiative offers a concession to one customer, it must make the same offer to competing customers. If a purchaser initiates negotiations, and, at the end of negotiations, a concession is agreed to, the seller need not offer it to competing purchasers. The seller only needs to offer it if another purchaser asks for it directly. The *Guidelines* specifically state that there is no obligation to offer the concession where a competing purchaser asks only for the seller's "best deal". Some have suggested that this interpretation suffers from practical difficulties in real world situations where it may be difficult to distinguish purchaser initiated negotiations from unilateral offers by sellers. More significantly, this approach may be argued to be inconsistent with the *Act* to the extent that the *Guidelines* interpret "available" as requiring an offer to be made. Section 51 requires that promotional allowances be offered to competing purchasers. Parliament must be considered to have intended a different and lower degree of obligation by using "available" in section 50(1)(a). A court may not accept that the terms should be given the same meaning in circumstances where a seller has made a unilateral offer to someone else as the *Guidelines* suggest.

Unlike certain other provisions of *Act*,[99] section 50(1)(a) does not exempt sales between affiliates. Nevertheless, the *Guidelines* appear to create an exemption for enforcement purposes. They state that the Bureau may consider transactions between affiliates as being something other than sales and so outside the price discrimination prohibition. The jurisprudence on what is a sale, however, is well settled and it seems unlikely that a court would exclude a transaction between affiliates if the formal requirements for a sale, including, in particular, the passing of title, are met.[100]

The *Guidelines* indicate that all the franchisees in a franchise system may be treated as a single economic unit, such that anyone selling to the franchisees may aggregate all their purchases for the purpose of granting volume discounts. Such an approach makes economic sense where there are cost savings to a seller associated with selling to a whole system, and when, as the *Guidelines* stipulate, the franchisor requires each franchisee to purchase from the seller. Nevertheless, it means interpreting "purchaser" in section 50(1)(a) to include all the franchisees. When all purchases are made by the franchisor who directs delivery to the franchisees such an interpretation is consistent with the *Act*. Where, however, the franchisees make their purchases individually and are individually responsible for payment, this interpretation seems doubtful.[101]

The *Guidelines* contain one other interpretive guide designed to reduce the burden of the price discrimination provisions. The *Guidelines* suggest that enforcement will only occur where the supplier is at least willfully blind as to the elements of the offence. As noted, previously negligence had been thought to be sufficient.

Comparison with the U.S. and Europe

United States

Federal antitrust law in the United States dealing with price discrimination is similar though more strict than the law in Canada. With the enactment of the *Robinson-Patman Act*[102] in 1936, the United States adopted a criminal prohibition in terms similar to the section 50(1)(a). As well the *Clayton Act*,[103] as amended by the *Robinson-Patman Act*, prohibits price discrimination in circumstances where the discrimination causes an injury to competition and provides a civil remedy for private parties who are victims of such discrimination. Upon proof of discrimination, a *prima facie case* is established. The onus then shifts to the discriminator to justify its behaviour. Where a private party is successful, it is entitled to three times its actual damages.[104] Public enforcement responsibilities are shared by the Antitrust Division of the Department of Justice and the Federal Trade Commission. The Antitrust Division alone is responsible for criminal prosecutions. The Federal Trade Commission may investigate price discrimination and other breaches of antitrust laws and issue cease and desist orders.[105]

Academics and the officials charged with enforcing federal antitrust laws have expressed the view that the *Robinson-Patman* criminal prohibition, divorced from any test of the effect of the discrimination on competition, is inconsistent with economic understanding of when price discrimination is anticompetitive.[106] The Antitrust Division of the U.S. Department of Justice has publicly stated that the criminal provision is not an enforcement priority.[107] All possible breaches of *Robinson-Patman Act* are referred to the Federal Trade Commission to determine whether investigations are warranted. The Federal Trade Commission has sporadically taken action against price discrimination, though there have been relatively few investigations.

With respect to the *Clayton Act* provisions, there are two main defences available, meeting the competition and cost justification.[108] So long as differences in prices may be attributed to differences in the costs of supplying different customers or to a response to pricing by a competitor, the discriminating firm will escape liability. Both these defences are justifiable on economic grounds but have proved difficult to rely on in practice. Various commentators have argued that cost justification is too expensive and difficult to establish, with the result that U.S. suppliers simply do not discriminate leading to increased price rigidity.[109] The "meeting the competition" defence has also been criticized as leading to price rigidity. As well concerns have been expressed that the defence encourages businesses to check each other's prices to make sure that they can take advantage of the defence. Such price verification has been approved by the U.S. courts despite the obvious risk that it may facilitate cartel-like behaviour.[110]

Price discrimination by a dominant firm may be found to be contrary to the prohibition on monopolization and attempted monopolization under section 2 of the *Sherman Act*.[111] A firm with monopoly power is prohibited from engaging in anticompetitive acts to maintain or enhance its market power. Similarly a firm which does not have a monopoly is prohibited from engaging in anticompetitive acts to obtain monopoly power where there is a "dangerous probability of success"[112] of such a strategy. Monopolization does not require complete control of a market, but must involve the power to control price and exclude competition. This basis for dealing with price discrimination is described in more detail under the discussion of abuse of dominance below.

Europe

Under the *Treaty of Rome*[113] European law also prohibits price discrimination, though the circumstances in which a breach will be found vary somewhat. Article 81(1)(d)(formerly Article 85(1)(d))[114] prohibits agreements that apply dissimilar conditions to equivalent transactions with other trading parties thereby putting them at a competitive disadvantage. Though this language is broad enough to include price discrimination, it only applies to "concerted" actions of multiple parties, not unilateral action. As such, section 81 would only apply to price discrimination imposed by cartels or as a consequence of an agreement or some other concerted action, between a supplier and someone else. Also, the discrimination must have as its object or effect the "prevention, restriction or distortion of competition."[115] There have been no published cases to date in which price discrimination has been challenged under Article 81(1)(d). The Director-General responsible for competition policy has indicated that price discrimination is not an enforcement priority of the Commission unless engaged in by a dominant firm, in which case the requirements of the European abuse of dominance provision, Article 82 (formerly article 86), are applied.[116]

Under Article 82 "applying dissimilar conditions to equivalent transactions with other trading parties thereby putting them at a competitive disadvantage" may be an abuse. This provision has been interpreted as not requiring identical treatment. It is violated only when there are significant unjustified differences in prices charged to buyers. So, for example, volume discounts are permitted.[117] It is not clear, however, when different treatment will be found to be unjustified. Fidelity discounts have been held to be unjustified.[118] The Commission and the Court of Justice have held that discounts which are based on sourcing exclusively from one supplier are abusive because they treat identical transactions differently. As in the United States, cost justified discounts and discounts to meet the competition are permitted.[119] Offering special low prices to a competitor's customers to attract their business or on the condition that they refrain from dealing in a competitor's products has been held to be an abuse.[120]

Assessment

Because price discrimination is common place and typically not anticompetitive, it is essential that the approach to dealing with price discrimination in Canada focus on when it has anticompetitive effect. The criminal price discrimination provision and its interpretation by the Bureau as expressed in the *Price Discrimination Enforcement Guidelines* have several defects in this regard.

Provisions of the Act: The exclusion from the price discrimination provision of transactions other than sales of articles is an apparent anachronism which fails to take into account the much broader range of transactions characteristic of the contemporary market place and the enormous and growing importance of transactions involving services and intellectual property rights. As noted, the civil provisions of the *Act* which apply to price discrimination in some circumstances do not have such limitations.

As well, the price discrimination provision in the *Competition Act* may be considered to be out of step with contemporary economic thinking on competition policy and much of the rest of the *Act*. Section 50(1)(a) focusses on protecting particular competitors from being discriminated against rather than protecting competition in the marketplace. In most circumstances, price discrimination is not anticompetitive and yet, unlike the American *Clayton Act*, nothing in the provision requires any assessment of the effect of price discrimination on competition.[121] Section 50(1)(a) does not even focus on truly discriminatory behaviour.

Most importantly, section 50(1)(a) does not include market power as a required element of the offence. Unless a supplier has market power, a supplier should not be able to discriminate because the victim can turn to another source of supply.

The current provision does not give sufficient scope for differential pricing motivated by considerations that are not anticompetitive. The offence is restricted to discrimination not justified by differences in quantity or quality. The provision does not require there to be any relationship between any price difference and the difference in quality or quantity. To be precise, there is no requirement for discrimination based on quantity or quality differences to be justified by reference to differences in the cost of supplying articles in different quantities or of different quality. Nor does the current provision permit other types cost justified discrimination.[122] By contrast, the *Clayton Act* directly recognizes cost justification.[123]

Meeting the competition is another defence which is not referred to in section 50(1)(a) but is permitted under the *Clayton Act*. The *Guidelines* suggest, however, that if a supplier is only meeting the competition, normally the "practice" requirement of section 50(1)(a) will not be satisfied.[124]

Section 50(1)(a) does not refer to whether discrimination is initiated by a competitor which the economic analysis in Part I suggests may be an indicator of circumstances in which price discrimination is anticompetitive. While the economic analysis in Part I shows that discrimination initiated by a competitor will not always have an anticompetitive effect, it may be a relevant indicator.

The current civil provisions dealing with the ultimate discriminatory act, refusal to deal, and behaviour which is functionally equivalent to price discrimination, such as tied selling, require a consideration of anticompetitive effects. The *Competition Act* would be more internally consistent as well as being more consistent with the economic analysis in Part I if it dealt with price discrimination in the same way.[125]

As it stands, it is probable that the provision discourages pricing practices which are not harmful to competition, imposing unnecessary compliance and monitoring costs on business. Because breach of the price discrimination provision carries the stigma of a criminal offence it may strongly deter behaviour which approaches price discrimination but which would be pro-competitive. This criminal stigma is not appropriate, even where price discrimination is anticompetitive, because it is not inherently criminal in the way that an agreement to fix prices is. For both reasons, the Consultative Panel concluded that the provision should be repealed and that any anticompetitive price discrimination could be addressed under the abuse of dominance or other civil provisions. This conclusion had been reached previously by several other studies.[126]

The abuse of dominance provision provides a ready framework for dealing with price discrimination which is consistent with the prescriptions of economic theory because it requires that the discriminator have market power and an assessment of the competitive effect of the discrimination. It would also allow enforcement action to take place in circumstances where the discrimination takes a form other than the sale of articles, avoiding the anachronistic limitations in section 50(1)(a). Section 79 would permit consideration of the aggregate anticompetitive effect of price discrimination and any other anticompetitive conduct engaged in by the discriminating firm. In this way, dealing with price discrimination under the abuse provision holds the prospect for more accurate assessments of the circumstances in which price discrimination is anticompetitive from an economic efficiency point of view.

In Europe, price discrimination is dealt with as an abuse of dominance. The European law on abuse of dominance is not informed by an economic model based on efficiency. Rather, the Europeans seek to control the operations of dominant firms in the interests of ensuring fairness in the market place, including the freedom of traders from being coerced by practices of dominant firms, including discrimination.[127] The requirement that price discrimination be engaged in by a dominant firm under Article 82 before it will attract enforcement attention is consistent with economic theory, as is European recognition of cost justification and meeting the competition as defences. Nevertheless, there are, undoubtedly, a much broader range of circumstances in which discrimination would be prohibited in Europe than economic theory would prescribe. In practice, the effect of the European approach may be similar to the strict American criminal approach under the criminal provisions of the *Robinson-Patman Act* under which no consideration of the effect on competition is required.[128]

The abuse provision's competitive effects standard is sufficiently flexible to allow the Competition Tribunal to take into account the kinds of considerations which are addressed in Europe. The Tribunal could seek to balance overall efficiency considerations against the interests of competitors in being free from discrimination in light of the circumstances of each case when determining whether there has been a substantial lessening of competition.

As well, the Tribunal has scope under the abuse provision to ensure that its decisions are responsive to the exigencies of the new economy. In a world characterized by innovation, an appropriate approach to price discrimination must consider the longer term dynamic effects in the market. Price discrimination in favour of partners in strategic alliances, for example, may be justified by the innovation the alliance is likely to produce. Such considerations are necessary for a competition policy responsive to the information economy.[129]

The potential application of the abuse of dominance provision to price discrimination is considered in the last section of this part.

Price Discrimination Enforcement Guidelines: While the *Guidelines* suggest an enforcement policy more consistent with economic considerations, they do not have the effect of transforming section 50(1)(a) into the type of provision that economic theory would prescribe. Significantly, the *Guidelines* do not read into the section an effect on competition test. This is entirely consistent with the provision which provides no scope for doing so. Nevertheless, it means that the *Guidelines* are only of limited effect in making section 50(1)(a) an effective provision for dealing with price discrimination.

The interpretive approach in the *Guidelines* is helpful by clarifying several interpretive questions in ways that are consistent with the economic analysis in Part I. Most significantly, by taking the position that any discount, whatever its form is acceptable so long as it is reasonably available to all competing purchasers, the burden of section 50(1)(a) has been lightened considerably. Unfortunately, the benefit is undermined to some extent by the requirements imposed by the *Guidelines* before a discount may be considered available. These requirements may be difficult to apply and, arguably, are inconsistent with the language in the *Act*.

The expansive interpretation of "sale" adopted in the *Guidelines*, which was intended to reduce the compliance burden for business, is not supported by the provision either. It might be justifiable from an economic point of view to treat all affiliated corporations as a single economic entity. Indeed, the sale price in transactions between affiliates may be affected by factors not applicable to sales between independent parties, such as the allocation of income between affiliates. Nevertheless, it is not clear that where there is a transfer of title between affiliates a sale will not have occurred for the purposes of the provision. As a consequence, it would seem inappropriate to exclude all transactions between affiliates from review.

A final concern regarding the *Guidelines* is that, while the abuse provisions and the other civil provisions of the *Act* dealing with discrimination are mentioned, the *Guidelines* provide little direction regarding the critical questions as to how these provisions will be applied in price discrimination cases or the criteria to be used to decide whether to proceed under one provision rather than another.[130] For example, the question of how discrimination induced by the market power of a large customer may be subject to review under the abuse of dominance provision is not considered.[131]

Predatory Pricing

General Discussion

Predatory pricing is a criminal offence under section 50(1)(c) of the *Competition Act*. Several elements must be established before the offence is proven. The alleged predator must be engaged in business and engaged in a policy of selling products at prices which are unreasonably low. As discussed in more detail below, both the "policy" requirement and the "unreasonably low" price requirement have raised difficult interpretive issues. Finally, one of four (4) alternative requirements must be met with respect to the policy:

1. The policy must have the effect or tendency of substantially lessening competition;
2. The policy must have the effect or tendency of eliminating a competitor;
3. The policy must be designed to substantially lessen competition; or
4. The policy must be designed to eliminate a competitor.

There has been very little jurisprudence to inform the interpretation of these requirements. In *Hoffman-La Roche,*[132] it was held that before a policy will be found there must be a conscious decision to sell at an unreasonably low price and there must be continuing or repeated sales, though a written policy need not be found. This approach was applied recently in *R.* v. *Perreault Driving Schools.*[133] Low pricing for a brief period, such as 48 hours for the purpose of meeting the competition, was held not to be a policy in *Producers' Dairy.*[134]

"Unreasonably low" was interpreted in the *Consumers Glass*[135] case. The court stated that the purpose of section 50(1)(c) was to prohibit selling at low prices for an anticompetitive purpose. The Court went on to describe a "classical example of predation" as deliberately sacrificing present returns by lowering price for the purpose of driving a rival out of the market, then raising prices to recoup the sacrificed returns and earn higher profit. The Court did not give any indication as to how to identity such a purpose, except to say that an anticompetitive purpose should not be inferred from the fact that a firm sets prices to a particular level with the intention of gaining business from a rival even if the alleged predator knew that pricing at that level would make it difficult for a new entrant to stay in the market. As the court stated, setting prices so as to take business away from rivals for the purpose of minimizing losses to a new entrant or maximizing profit is the whole object of competition. So long as a firm is acting to maximize profits or minimize losses, prices should not be considered unreasonably low.[136] The court did not identify the existence of market power or the existence of barriers to entry as necessary conditions to a finding of predation, as our economic analysis in Part I would prescribe.

In *Consumers Glass*, the industry suffered from chronic excess capacity and prices were above average variable cost. The Court determined that, in these circumstance, prices could not be said to be unreasonably low. They were set to minimize losses. Such low pricing would be expected equally where demand falls off due to a depressed market. In neither case should an intention to predate be inferred.

Where a price reduction is defensive, that is, in response to price cutting by a rival, even if it is a pre-emptive response, pricing is unlikely to be found to be unreasonably low unless it is disproportionate, in some way, to the rival's behaviour.[137] So, for example, if the alleged predator's price cut is excessively deep or maintained for a long period of time, low prices put in place as a defensive response may nevertheless be found to be unreasonably low.[138] In *Hoffman-La Roche*, a defensive response consisting of giving away drugs for 6 months on two occasions was held to be predatory.

Another factor relevant to determining if prices are unreasonably low is cost. In *947101 Ontario Limited Ltd.* v. *Barrhaven Town Centre Inc. et al.* it was confirmed that it is only the alleged predator's costs which are relevant, not those of the victim.[139] As discussed in the economic analysis in Part I, if only the victim's costs were considered, pricing above the predator's costs which was below the costs of a less efficient competitor could be found to be predatory. The courts have been less clear on what is the appropriate cost based test. While *Consumers Glass* and *Hoffman-La Roche* held that pricing above average total cost could not be predatory, the presumption of predation from pricing below average variable cost suggested by Areeda and Turner has not been adopted, nor has a test been articulated for grey zone pricing between average variable cost and average total cost.

The issue of sales below average variable cost was not addressed in *Consumers Glass* on the basis that there was no evidence of such sales in that case.[140] In *Hoffman-La Roche*, where the alleged predation consisted of giving away drugs, the court did not state a definitive rule with respect to below average variable cost pricing. Instead, the court acknowledged that there may be circumstances in which pricing below some measure of cost would be justified and the question to be asked in each case, as indicated above, was whether there were any "external or anticipated long term economic benefits which would accrue to the seller by reducing its prices below cost". The court suggested that where the firm was attempting to defend its market share, or attempting to "keep its business alive, its customers supplied and its employees working during a difficult economic period" predation should not be found.[141]

Under the *Act*, once a policy of selling at unreasonably low prices is found the question becomes whether the policy has the "effect or tendency of substantially lessening competition or eliminating a competitor, or [is] designed to have that effect". Though the case law provides little guidance, several preliminary observations may be made regarding the interpretation of these requirements. While "effect" refers to a state of affairs which has occurred, "tendency" refers to a state of affairs which has not yet occurred but where there is some likelihood that it will occur. The Bureau must assess the actual results of the predation in the market to determine the effects and must assess what is likely to occur in the market to assess tendencies. Assessing competitive effect of the results, however, will require consideration of the likely future behaviour of existing and prospective market participants. By contrast, the reference to "designed" suggests an enquiry into the subjective intention of the alleged predator without regard to whether the behaviour, in fact, has had or would tend to have any particular effect.

A "substantial lessening of competition" is the same language used in the abuse of dominance provision and when considering the effect or the tendency of a policy of unreasonably low pricing, it may be that a court would adopt the interpretation of that standard developed in abuse cases.[142] The application of the abuse of dominance provision and this test are discussed in more detail below. It is difficult to say more regarding these alternative bases of liability because there has been no judicial decision addressing these aspects of the provision.

In some cases, there will be evidence of intent to predate. Though no such evidence was found in *Consumers Glass*, the court commented on the inherent unreliability of such evidence. Words used to describe aggressive competition may be used carelessly, inadvertently suggesting an intention to eliminate a competitor.[143] By contrast, in *Hoffman-La Roche*, intent evidence was relied on to convict the accused.

The *Competition Act* contains one other provision directed at predatory pricing behaviour. Geographic price discrimination occurs where a person charges prices for products in one area of Canada which are different from those that it charges elsewhere. Geographic price discrimination is specifically prohibited under section 50(1)(b) of the *Act* where any of the same lessening of competition or elimination of a competitor tests has been met. There has been only one conviction under this section.[144]

The Predatory Pricing Enforcement Guidelines

In 1992, the Competition Bureau issued the *Predatory Pricing Enforcement Guidelines* which interpret the predatory pricing provision in a manner essentially consistent with the economic model of predation described in Part I and, for the most part, consistent with the limited case law, though there are some areas in which the *Guidelines* may be considered to go beyond the wording of the provision.

The Bureau adopts a two part test to determine whether prices are unreasonably low based on the approach endorsed by the OECD.[145] First, the Bureau looks at one of the key indicators of predation identified in Part I: market power, including market share and barriers to entry. In order to define market share, the first task is to define the relevant geographic and product market. The *Predatory Pricing Enforcement Guidelines* suggest that this will be done in the same manner as is indicated in the *Merger Enforcement Guidelines.*[146] Once the market has been defined, the next step is to look at market share. According to the *Predatory Pricing Enforcement Guidelines*, where the alleged predator has less than 35 per cent of the market, the alleged predator would probably not be able to affect price unilaterally.[147] Other market structure considerations are referred to in the *Guidelines*. For example, the relative size of the alleged predator compared to its rivals in the marketplace may be important. If the alleged predator is much larger than its rivals and the competitive fringe of smaller firms, the likelihood of market power is increased.

The Bureau is less likely to pursue a case in which barriers to entry are low and entry into the predator's market or the expansion of the operations of existing firms would be likely to occur if the predator attempted to recoup its losses from a predatory campaign by raising prices.[148] The *Guidelines* suggest that in considering barriers to entry, again the approach set out in the *Merger Enforcement Guidelines*[149] will be followed. The *Guidelines* specifically refer to the 2 year period specified in the *Merger Enforcement Guidelines* as the appropriate time period to assess barriers to entry: are barriers sufficiently low that price increases following the predatory campaign will invite entry into the industry on a sufficient scale within 2 years to ensure that price increases could not be sustained. The use of this 2 year period has been criticized on the basis that the appropriate time period should depend upon the circumstances, including the length and severity of the period of predation.[150]

Under the *Guidelines*, barriers to entry include both cost advantages enjoyed by incumbent firms, such as barriers in the form of licensing requirements which the incumbent has already satisfied and control of essential technology or sources of raw materials through vertical integration. Sunk costs, those that cannot be recovered should an entrant fail, may also deter or reduce the scale of entry. These include costs associated with acquiring market specific assets which have no use or value outside their application in the relevant market.[151] Barriers may also result from the presence of economies of scale or scope which the new entrant would have to achieve to be competitive.[152]

While economic analysis prescribes that barriers to entry be considered, some have questioned whether the approach taken in the *Guidelines* is the best one. Hunter and Hutton suggest that all sunk costs may be financed so long as capital markets are perfect. Hunter and Hutton are not troubled that this assumption is unjustified in practice because, in their view, imperfections in capital markets are not the problem of the Commissioner of Competition.[153] With respect to cost advantages, Hunter and Hutton argue that only those which are external to the predator, such as a licensing scheme, should be taken into account. If a cost advantage is due to efficiencies of the predator it should not figure in the analysis because it will not permit the predator to earn supra-normal profits. It will only be able to price up to the level of its competitor's costs before entry or expansion will occur. From an efficiency point of view, predation is less of a concern where the predator is demonstrably more efficient than its victim.

The *Guidelines* also acknowledge the possibility of strategic barriers, such as actions by firms to create a reputation for toughness which would discourage entry. Running up sunk costs may be another form of strategic behaviour as are exclusive dealing and tied selling arrangements and other arrangements with customers which may make market entry difficult.[154]

While no market power test is expressly called for in section 50(1)(c) or by the case law, it must be acknowledged that, as a standard, "unreasonably low" does not give specific guidance as to the relevant criteria for its application. Arguably, it is susceptible to an almost unlimited range of interpretations and

Hoffman-La Roche[155] directs that all relevant circumstances be taken into account. On this basis the interpretation in the *Guidelines* cannot be said to be inconsistent with the *Act*, though, at the same time, one cannot state that a court would come to the same result with complete confidence.[156]

The second step, in determining whether there is evidence of unreasonableness, is to apply a cost based test. Consistent with *Consumers Glass* and *Hoffman-La Roche*, prices above average total cost will not be considered to be unreasonable low. As noted, the case law does not provide specific guidance regarding price/cost comparisons. Nevertheless, the *Guidelines* go on to do so. Prices less than average variable cost will be considered to be unreasonably low in the absence of some legitimate commercial objective, such as the need to sell off perishable inventory.[157] Under the *Guidelines*, prices in the "grey area" (between average total cost and average variable cost) may be predatory or not depending on all the circumstances. If there is direct evidence of predatory intent or the alleged predator was lowering prices in the face of increasing demand, the Bureau would consider that the prices in the grey area were unreasonably low. By contrast, prices in the grey area may be considered reasonable where demand is declining, or there is substantial excess capacity in the market, even if it causes the exit of other firms.[158] Excess capacity was one of the factors relied on by the court in *Consumers Glass* as a justification for prices in the grey range. Because capacity was more than double what was required, "competition and the desire to make as high a contribution as possible toward fixed overhead will naturally drive down the price of the product below the total cost of manufacturing that product and towards but not below the variable cost of manufacturing the product."[159]

The *Guidelines* suggest a methodology for the determination of costs, both variable and fixed.[160] They do not suggest a time frame. As indicated above, from the point of view of economic theory, it is only reasonably anticipated long run costs which are relevant.[161] The *Guidelines* provide no direction with respect to the time frame for looking at costs though they do express a preference for forecast over historical cost.

The *Guidelines* refer to the requirement, stipulated in section 50(1)(c), for the alleged predator to have a "policy" of selling at unreasonably low prices. This part of the *Guidelines* closely follows the interpretation of this requirement in the case law. The Director will look for pricing which is not "a competitive expedient of brief duration," but rather is "a deliberate corporate program" of "sufficient duration." Sufficiency will be determined by reference to the characteristics of the market. So, for example, where the market is seasonal, prices maintained over a relatively short time may be considered a policy.

As described so far, in developing a framework for analysing whether prices are unreasonably low the *Guidelines*, in effect, require consideration of the effect and likely future effect on competition. Section 50(1)(c) mandates such an inquiry when one is considering whether the alleged predatory behaviour has the effect or tendency of substantially lessening competition. But competitive effect is not the only basis for liability under section 50(1)(c). The provision also refers to the effect of or tendency to eliminate a competitor and to unreasonably low pricing policies *designed* to substantially lessen competition or eliminate a competitor. As noted above, a policy may be found to be designed to have these effects regardless of whether it has or is likely to have them. The two stage test described above is concerned with the likely effect in the market, with whether the alleged predator is going to be able to recoup its losses. The test itself may not be satisfied where the effect is only to eliminate a competitor. More significantly, the test does not take into account subjective intent as an independent basis of liability.

There are several statements in the *Guidelines* which suggest that meeting the two stage test for unreasonably low prices is not an absolute threshold requirement for proceeding with a complaint about predatory pricing. The *Guidelines* indicate that unreasonable low prices may be inferred from all the circumstances including, evidence of predatory intent and the exclusion or elimination of competitors.[162] Some have argued that willingness to consider intent and effects on competitors simply muddies the analysis.[163] There are many problems[164] when relying on evidence of intention in these circumstances, and the attitude of the courts is difficult to predict given the different approaches taken in *Hoffman-La Roche* and *Consumers Glass*. Nevertheless, the precise wording of the section requires that it be taken into account.[165] The thrust of the *Guidelines*, however, is to de-emphasise these bases of liability.[166]

Comparison with United States and Europe

United States

Predatory pricing is addressed in the United States either as a possible violation of section 2 of the *Sherman Act* or of section 3 of the *Robinson-Patman Act*. Under the *Sherman Act* predation is dealt with as a species of monopolization or attempted monopolization. The *Robinson-Patman Act* prohibits price discrimination and thus addresses predatory pricing where the predatory prices are not charged to all customers in all markets though, as noted in relation to price discrimination, this criminal provision is rarely enforced. While there are some differences, the broad outlines of U.S. federal laws on predation operate in a manner substantially similar to the approach taken by the Bureau as expressed in the *Guidelines*.[167]

In terms of enforcement, private civil proceedings to seek relief from predatory pricing may be taken under the *Clayton Act* in connection with violations of the *Sherman Act* and, as with price discrimination, the Federal Trade Commission may investigate and issue cease and desist orders in relation to predation. The Antitrust Division of the Department of Justice may prosecute violations of the *Sherman Act* or take civil action.

Since the decision of the 7th Circuit Court of Appeals in *A.A. Poultry Farms, Inc*. v. *Rose Acre Farms, Inc*.,[168] in 1989, the first step in the analysis of predation is whether there is a prospect of recoupment. If recoupment is implausible, then there is no need to go forward to look at a comparison of pricing and costs.[169] In *A.A. Poultry Farms, Inc*. v. *Rose Acre Farms, Inc*. it was also held that evidence of subjective intent is essentially irrelevant.[170] This approach was approved by the Supreme Court of the United States in 1993.[171]

The Supreme Court has not authoritatively determined what is the appropriate cost test for predation. The most commonly applied standard is a modified version of the Areeda-Turner test. If prices are below average variable cost, intent to monopolize will be presumed though the presumption may be rebutted. By contrast, if prices are above average total cost, predation is presumed to be absent. In the grey zone, likelihood of success is determined by reference to market structure characteristics. If high barriers to entry exist and the alleged predator has a large market share a dangerous probability of success will be found.[172]

Various states have laws which address predation and related issues. Some are laws of general application and some address specific sectors. Some of these state statutes have been interpreted in a manner consistent with the federal approach, while others are used to protect classes of competitors, typically protecting unintegrated, independent businesses from large vertically integrated competitors.[173] The effectiveness of these laws has been questioned. Often they suffer from sporadic enforcement. In jurisdictions with such laws, several studies have shown higher prices prevail as compared to states without such laws. Some have concluded that higher prices reflect higher retail margins for retailers.[174] However, in his recent study of the U.S. gasoline industry from 1987 to 1992, Johnson concluded that sales below cost laws do not protect independent gas marketers.[175] Johnson determined that the existence of sales below cost did not have a significant impact on slowing the decline in the number of small outlets.

Europe

In Europe, predation is dealt with only where it is engaged in by a dominant firm contrary to Article 82 of the *Treaty of Rome*. The elements which must be established are broadly similar to those referred to in the *Guidelines*, though there have been relatively few cases so the precise requirements cannot be stated with certainty. European cases have not developed a robust economic analysis of predation.

In *AKZO Chemie BV* v. *Commission*,[176] the Court of Justice took the position that sales below average variable cost should be considered predatory, following the approach advocated by Areeda and Turner. Where prices are between average variable cost and average total cost, abuse may still be found where there is evidence of a plan to eliminate a competitor.[177] While the prospect of recoupment has been referred to in European cases, it has not emerged as an independent requirement for a finding of abuse by predation. The requirement that a firm be dominant may be, at best, a weak proxy for prospects of recoupment. Market share alone does not reveal anything regarding barriers to entry, a key consideration in any recoupment analysis. A finding of dominance in Europe may but need not take into account barriers to entry.[178]

Assessment

Provisions of the Act: The predatory pricing provision, on its face, is uncertain in scope. As discussed above, the requirement for unreasonably low prices requires some analytical framework if it is to be applied in any coherent way. While the case law suggests that some cost/price comparison is relevant it does not indicate precisely what the test should be nor has a recoupment analysis been adopted or rejected. The cases do hold that where there is some procompetitive rationale for low pricing which is consistent with the conditions in the market, low pricing should not be considered unreasonably low. Nevertheless, there has not been sufficient case law to develop a clear analytical framework, as in the United States and, to a lesser extent, in Europe.

In the absence of an analytical framework for determining when prices are unreasonably low, the provision is potentially extremely broad. Any intention to eliminate a competitor or the elimination of a competitor in fact, combined with low prices may be sufficient for liability. While efficiency concerns might argue in favour of a regime which prevented below cost pricing which had the effect of eliminating a more efficient, vigorous or innovative competitor, the existing provision protects all competitors, regardless of the overall effect on competition or efficiency. To this extent, the provision is in conflict with the economic analysis of predation based on efficiency.

Economic theory is based on business people acting in rational ways. The existing predatory pricing provision is based, in part, on the view that the market does not always reflect rational behaviour, in the sense that rationality requires profit maximizing or loss minimizing.[179] In the real world, business people may decide to predate when they have no prospect of recoupment, either because they miscalculate market conditions or they prefer predation over profit maximizing strategies. For public corporations, capital markets will exercise some discipline on managers in both cases, but in private firms it may be only the architects of predatory policies who suffer the consequences of their bad judgement or idiosyncratic preferences. Nevertheless, in some subset of such cases, there may be real damage inflicted on other participants in the market place as a consequence of conduct which is intentionally destructive of competition.

There may be no efficiency justification for intervening in such a case. Unsuccessful predation will provide consumers with the benefit of temporarily low prices and the continuing competition in the market will prevent supra-competitive pricing. Nevertheless, enforcement action would appear to be possible under the section. Indeed, in some circumstances, a court may be concerned that one of the purposes of the *Act*, "maintaining competition ... to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy" could only be served by convicting someone with a clearly demonstrated intention to eliminate a competitor through a low pricing policy. Such a conclusion would be even more compelling if a vigorous, innovative competitor was eliminated, as a consequence of the predatory pricing.

Though there has never been a case in which predatory pricing has been found under the abuse of dominance provision, it has several advantages over the criminal predation provision. It expressly includes a requirement for market power as the economic analysis in Part I prescribes. As well, it requires an assessment of the effect on competition. The Tribunal would be able to consider not only whether there was a prospect of recoupment through supra-competitive pricing, but also the effects of predatory behaviour on the dynamic of competition in the market in which the predation took place. Such effects would include effect of the loss of particular competitors and their prospects for re-entry. The Tribunal would have to sort out the extent to which it was appropriate to take into account non-efficiency based considerations, such as the fairness of intentionally eliminating a competitor through low prices.

The abuse provision would also permit account to be taken of the particular conditions in the marketplace, including the factors discussed in relation to the new economy in Part I. Where a market was characterized by high levels of innovation, declining costs and network effects, low pricing which eliminated a competitor might nevertheless be found to be procompetitive, where the pricing was part of a strategy to introduce a new and better technology and any dominance which resulted was unlikely to be sustained in the face of future innovation. In such a market, the prospects of supra-competitive pricing likely would be remote.

The application of the abuse provision is considered at the end of Part II.

Predatory Pricing Enforcement Guidelines: The approach taken in the *Guidelines* generally accords with the approach suggested by the economic analysis described in Part I, and adopted by the OECD and the United States Supreme Court. Although such an approach has not yet been fully adopted in Europe, recent decisions suggest a trend in that direction. The *Guidelines* provide a useful analytical framework for interpreting the vague language of section 50(1)(c). Nevertheless, while the basic elements prescribed by an economic approach are addressed, one may be concerned about the extent to which the *Guidelines* have had to stretch the language of the *Act* to accommodate these economic considerations.[180] As well, the *Guidelines* themselves would be improved by more fully accounting for the new theories of predation referred to in Part I and the exigencies of the new economy.

With respect to the consistency between the *Guidelines* and the *Act*, the main concern is how the *Guidelines* deal with intent and the elimination of competitors. While the *Consumers Glass* case accepted that below cost pricing should not be prohibited where there is a procompetitive explanation and no direct evidence of intent to eliminate a competitor, it did not address the situation where intent is present. It is not clear whether, where intent evidence is available, it would be necessary to show that a predatory strategy would have been successful in the sense that the predator would have been able to recoup its losses incurred during its predatory campaign. As discussed, above, the express reference to the elimination of a competitor or a design to do so in section 50(1)(c) would seem to confirm that a reasonable prospect of successful recoupment in fact is not necessarily required. The possibility for finding predation where there is no prospect of recoupment appears only faintly in the *Guidelines*. That the approach suggested in the *Guidelines* may vary from what the *Act* requires does not mean that approach is wrong. It is more consistent with economic theory than the provision itself. Any variance from the statute does, however, make the *Guidelines* less reliable as a guide to private sector behaviour.

Apart from their approach to the *Act*, there are several other criticisms that may be levelled at the *Guidelines*. As will be discussed below, the abuse of dominance provision provides a firmer statutory basis for the kind of analysis suggested in the *Guidelines*. The *Guidelines* acknowledge the possibility of proceeding under the abuse provision but provide little guidance as to the criteria for doing so and state no preference for doing so.

From the perspective of economic theory, the discussion in the *Guidelines* of "strategic barriers to entry" should be expanded to refer more specifically to the indicia of possible predation which recent economic analysis suggests should be relevant. The difficult challenge of assessing reputational effects in multiple markets and long purse predation, for example, are not addressed.

The imperatives of the new economy should be addressed as well. Guidance regarding the appropriate definition of product and geographic markets and market power in industries characterized by high rates of innovation and declining barriers to entry due to improvements in technology, for example, would make the *Guidelines* more relevant for firms in those industries. Below cost selling would have to be assessed in light of an analysis of the dynamic operation of the market in which the alleged predation is occurring. It is likely that legitimate efficiency enhancing competition through low pricing practices, will become more pervasive, in industries characterized by high rates of innovation, increasing returns and where the prospect of establishing the industry standard may have substantial benefits. Where dominant market share in the early period of the product cycle often spells important long term advantages that may be exploited either through higher prices or in other ways, low pricing, even pricing below cost, may be becoming increasingly commonplace.

As well, the prospects for recoupment though non-price strategies should be considered. It may be that long run benefits in forms other than higher prices may eliminate or strongly attenuate the need to recoup losses through supra-competitive prices. In some industries, losses incurred may be recouped by establishing a product standard or simply gaining market share and exploiting this situation to advantage through gains on updating or other incidental services.

As well, it would be helpful if the *Guidelines* were to address allegations of predation where firms sell multiple products, such as in the grocery industry. It may be very difficult to analyse predation where low pricing does not involve all of the alleged predator's products, but only certain strategically important products. The *Guidelines* provide little assistance regarding how to assess predation in this context.

With respect to cost, the *Guidelines* should address the relevance of capacity to the appropriate measure of cost. In *NutraSweet*, a case under the abuse of dominance provision, the Competition Tribunal noted, as do Areeda and Turner, that average variable cost is a reasonable proxy for marginal cost only so long as the alleged predator has excess capacity. Where the predator is operating at full capacity, average total cost is a better proxy because of the necessity to expand production facilities to increase production. This insight is not reflected in the *Guidelines*.

Price Maintenance

General Discussion

Resale price maintenance has been prohibited in Canada since 1951.[179] In 1960, the law was amended to add the current defences to the related offence of refusing to supply a customer because of the customer's low pricing policy.[180] In 1976, the law was further amended to broaden its reach to include all forms of price maintenance, including price maintenance engaged in by competitors, or horizontal price maintenance. The amendments also brought within the ambit of the section transactions involving services and intellectual property rights.[181]

Under the present section 61 of the *Competition Act*, it is illegal for a person engaged in business to attempt to influence upward or discourage the reduction of the price at which any other person engaged in business offers or supplies a product in Canada by "any agreement, threat, promise or like means".[182] Requests, discussion, persuasion and suggestions directed toward the maintenance of prices, however, are all permitted.[183] Breach of the provision is a criminal offence.[184]

With respect to the meaning of "agreement" for the purposes of section 61, there is no requirement that any agreement be forced on the person committing to maintain prices.[185] Price support programs in the retail gasoline sector taking the form of voluntary allowances available to retailers to offset the effect of price drops have been held to constitute an agreement to maintain prices which indirectly discouraged retailers from reducing their prices.[186] Threats consist of any communication in advance of an adverse future action which will be taken if a suggested course of action is not carried out.[187] Threats have been held to include statements from a supplier that it would refuse to supply, reduce credit available or limit sales options if prices were not maintained.[188] Promise refers to holding out benefits in the future if prices are maintained. "[L]ike means" has been interpreted restrictively to include only things like or akin to an agreement, threat or promise. So, for example, an unaccepted offer of a benefit was considered to be like means.[189]

Section 61(3) provides that suggested resale prices or minimum resale prices are not prohibited provided that it is made clear to the reseller that the reseller is under no obligation to accept the suggestion and would in no way suffer in its business relations with the person making the suggestion or anyone else if it fails to accept the suggestion.[190] The standard is a strict one. Where a resale price or minimum resale price is suggested, an "attempt" to influence the pricing of the person to whom the suggestion is made is proved in the absence of further proof that the proviso is also satisfied. Similarly under section 61(4), if the suggested price appears in an advertisement, it must be expressed in such a way that it is clear to any person who looks at the advertisement that the product may be sold at a lower price, otherwise an attempt to influence price upward will be found.[191] It has been held, however, that proof of an attempt for the purposes of these provisions is not proof of the offence; the Crown must still show an agreement, threat, promise or like means.[192] Some commentators have suggested that this renders sections 61(3) and 61(4) ineffective.[193]

Refusing to supply a person because of that person's low pricing policy is similarly prohibited. It is sufficient for a conviction, if the low pricing policy is a reason for the refusal. It does not have to be the only reason. Refusals of new as well as existing customers are caught by the section.[194] It is also an offence to "otherwise discriminate" against a person because of their low pricing policy, such as by charging higher prices to a discounting reseller. A person may be liable for discriminating within the meaning of s. 61, in circumstances where the express prohibition on discriminating in section 50(1)(a) of the *Act* is not violated. The scope of permitted discrimination has not been clarified in the case law.

Section 61(10) provides four (4) defences for refusing to supply. A supplier may refuse to supply a person where that person is making a practice of any of the following:

1. using products supplied as loss leaders (the *"Loss Leader Defence"*);
2. using products supplied not for the purpose of selling them for a profit but to attract customers to buy other products;
3. engaging in misleading advertising in respect of the products supplied; and
4. not providing the level of service that purchasers of the products might reasonably expect (the *"Service Defence"*).[195]

To avoid liability it is only necessary for a supplier to establish that it, or any person on whom it relied, had reasonable grounds to believe that its customer had acted in one of the ways described.[196] In each case, a practice by the customer must be shown. This has been held to be something other than an isolated act or acts.[197] The Loss Leader Defence has been resorted to most frequently and most successfully. There have been few cases on the Service Defence. In *R.* v. *H.D. Lee of Canada*, it was held that the relevant level of service is that which customers might expect, not the supplier.[198]

Under section 61(6) no person may, by threat, promise or any like means attempt to induce a supplier, as a condition of doing business with the supplier, to refuse to supply a product to a particular person because of the low pricing policy of that person. This section may be broadly interpreted. A complaint to a supplier about the low pricing policy of a competitor accompanied by a threat to refuse to continue doing business with the supplier if the supplier does not cut off the competitor is sufficient, even if the supplier does not respond. The Loss Leader Defence and other defences are not available in connection with proceedings under this provision.

Though the price maintenance provisions have been applied primarily in the vertical context, the possibility of dealing with price fixing as horizontal price maintenance under section 61 as an alternative to a conspiracy prosecution under section 45 is attractive because there is no requirement to show any impact on competition under section 61. Horizontal price maintenance has been found in several cases.[199] The precise scope for using section 61 as a substitute for section 45 in relation to agreements on price is not clear.

Comparison with U.S. and European Union

United States

Resale price maintenance was held to be a *per se* violation of section 1 of the *Sherman Act* in the 1911 decision of the U.S. Supreme Court in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*[200] In order to establish liability, an agreement to maintain prices must be proved, either directly or by inference. Non-binding price suggestions are not illegal, even if a supplier refuses to supply a customer who does not adopt them.[201] If it can be established that the suggestion amounted to coercion, a violation will be found.[202] As with other violations of U.S. antitrust laws, enforcement action may be taken though criminal or civil proceedings initiated by the Antitrust Division of the Department of Justice, investigation and the issuance of a cease and desist order by the Federal Trade Commission or through private action under the *Clayton Act*.

There are two exceptions to *per se* illegality. Where a good is sold on consignment or through an agent there is no resale price maintenance,[203] unless the agency or consignment was established solely for the purpose of circumventing the rule against resale price maintenance.[204] More significantly, a seller is permitted to announce maintained prices and refuse to deal with price cutters.[205] However, one dealer is not permitted to agree with the supplier that another dealer should be cut off. At one time, any communication between the supplier and another dealer prior to termination might give rise to an inference of an agreement on resale prices. Since the decisions of the U.S. Supreme Court in *Spray-Rite Corp.* v. *Monsanto Co.*[206] and *Business Electronics Corp* v. *Sharp Electronics Corp.*,[207] this exception has been more broadly interpreted. There must be an express agreement to set resale prices. Resale price maintenance will not be inferred from the termination of one dealer following complaints by another.

The enforcement policy of the Antitrust Division of the Department of Justice in the early 1980's has been not to enforce the law against resale price maintenance.[208] More recently, enforcement activity has increased.[209] Resale price maintenance is the subject of investigations by the Federal Trade Commission and private civil actions.

Europe

Price maintenance by a dominant firm has been held to be a violation of Article 82 of the *Treaty of Rome*.[210] Also, agreements to fix resale prices, such as agreements between suppliers,[211] have been found to be a breach of Article 81, though non-binding suggestions of resale prices are permitted.[212] Service enhancement has been held to be a valid defence, since it has the effect of increasing competition, albeit not on price.[213]

Assessment

The likelihood of efficiency justifications means that Canada's blanket *per se* prohibition of vertical resale price maintenance is not consistent with the economic analysis set out in Part I.[214] The existing Service Defence and the other defences to refusal to supply are consistent with the analysis in Part I but would need to be broadened and made more flexible if they are to fully accommodate efficiency rationales.[215] Efficiency defences would also have to be available for price maintenance generally, not just refusal to supply.

The existing provision is also deficient in that it does not impose a requirement that the person engaged in price maintenance have market power. In the absence of market power, customers unhappy with efforts at price maintenance can obtain supply elsewhere.

With respect to 61(6), where a customer of a supplier requires the supplier to refuse to supply a competitor, the customer may be seeking to protect itself against price competition. Nevertheless, whether there will be an anticompetitive effect will depend on the market power of the supplier and the effect in the downstream market. Consequently, even here, a *per se* treatment is not called for as a matter of economic theory in every case and the existing *per se* provision may inhibit efficient behaviour. It would be more consistent with the economic analysis in Part I to treat price maintenance on a rule of reason basis in the same manner as other vertical restraints under the *Act*.[216]

Analysing price maintenance under the abuse of dominance provision provides some prospect for taking these considerations into account. Market power and a consideration of competitive effects are necessary elements of abuse. In assessing anticompetitive effects, the Tribunal would have to develop an approach to determining the relevance of the interests of firms in being free from attempts to get them to raise their prices. Some of the issues associated with dealing with price maintenance under section 79 are discussed in the next section.

The prohibition of horizontal price maintenance arrangements under section 61 is appropriate. Dealing with horizontal price maintenance under a *per se* rule, however, would appear to undermine the operation of the conspiracy provision, which subjects price fixing to a competitive effects test. An assessment of the relative merits of the two approaches is beyond the scope of this study.

Abuse of Dominance

General Discussion

The abuse of dominance provision was introduced into Canadian competition law in 1986 to replace the criminal monopoly provision.[217] The purpose of the provision is not to address the fact of structural dominance in a market, but to provide relief where dominance has been used to abuse the interests of consumers or producers.[218] While the old monopoly provision and the provisions prohibiting price discrimination, predatory pricing, and resale price maintenance create criminal offences under the *Competition Act*, the provisions dealing with abuse of dominant position provide for civil review by the Competition Tribunal applying the civil standard of proof.[219]

The Competition Tribunal has the power to prohibit dominant firms from engaging in anti-competitive activity in some circumstances. If a prohibition would not be effective to restore competition, the Tribunal may make alternative orders as are necessary to overcome the effects of anticompetitive acts, such as to require firms to take specific actions, including asset or share divestitures.[220]

Section 79(1) provides as follows:

> Where, on application by the Commissioner, the Tribunal finds that
> (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
> (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
> (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,
>
> the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

The threshold requirement for the application of section 79 is that a firm be dominant. This is captured in section 79 by the requirement that a firm "substantially control a class or species of business throughout Canada or any part of Canada." The courts have held that, in order to apply this rather vague criterion, it is necessary to first define the product and geographic market.[221] In order to define the relevant product market, the Tribunal has looked to such factors as direct and indirect evidence of substitutability and functional interchangeability of products, trade views on what constitutes the same product and the costs of switching from one product to another.[222] The Tribunal has defined the relevant geographic market by reference to the boundaries with which competitors must be located if they are to compete with each other and where prices tend toward uniformity. The Tribunal has recognized that the definition of the market will have a significant impact on any conclusion regarding the effect of the dominant firm's behaviour on competition.[223] In general, the more broadly the market is defined, the less likely it is that firm's behaviour will be found to substantially lessen competition.

Once the market is defined, the degree of control by the allegedly dominant firm must be assessed. "[S]ubstantial control" has been equated with market power, meaning that the allegedly dominant firm has the ability to maintain prices above competitive levels for a considerable period.[224] The primary indicators of market power are market share and barriers to entry.[225] High market share alone will give rise to a presumption of dominance.[226] In *Laidlaw*, the Tribunal stated that dominance would not be presumed where market share is below 50 per cent. The Tribunal has yet to deal with a contested claim of dominance where the allegedly dominant firm has a market share lower than 85 per cent.[227] The 50 percent threshold is higher than the 35 per cent threshold set in the *Merger Enforcement Guidelines*[228] and the *Predatory Pricing Enforcement Guidelines*. With respect to barriers, the Tribunal will consider sunk costs and economies of scale, as well as competition and other barriers. Sunk costs or economies of scale on their own are likely to be regarded as insufficient.[229] The Tribunal will also consider the number of competitors, their relative market shares and whether there is excess capacity in the market.[230] Notwithstanding the guidance provided by the Tribunal in past cases, predicting when the Tribunal will find dominance often will be difficult.

Once dominance is established the Tribunal must determine that the dominant firm has engaged in a practice of anticompetitive acts which has had, is having or is likely to have the effect of preventing or lessening competition substantially. Section 78 of the *Competition Act* lists a number of anti-competitive practices which the Competition Tribunal may find to constitute abuse. The list is not exhaustive and, in several cases, acts outside those specified in section 78 have been found to be abusive.[231]

> For the purposes of section 79, "anti-competitive act", without restricting the generality of the term, includes any of the following acts:
>
> (a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;
>
> (b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
>
> (c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
>
> (d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;
>
> (e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;
>
> (f) buying up of products to prevent the erosion of existing price levels;
>
> (g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;
>
> (h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and
>
> (i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

Examples of Anticompetitive Acts Listed in Section 78

Subjective intent is not required in order for a practice to be anti-competitive under section 79.[232] Nevertheless, for all acts listed in section 78, the Tribunal must find that the alleged abuser "intended" to act in an anticompetitive manner.[233] This means an intention to cause some predatory, exclusionary or disciplinary effect on a competitor. Intent may be established by direct evidence or may be inferred from the circumstances.[234] Indeed, the Tribunal has gone so far as to state that parties are deemed to intend the effects of their acts, if they cannot provide evidence to the contrary.[235] The Tribunal has also considered the existence of an economic or business explanation as very important in determining whether a practice is anticompetitive, but the existence of a legitimate business rationale, alone, is not sufficient to justify an anticompetitive practice.[236]

If the Tribunal finds that particular actions are abusive, it must go on to find that they constitute a "practice" of abuse. The Tribunal has held that a practice may consist of anything more than an isolated act or acts and that different anticompetitive acts could together constitute a practice.[237]

Finally, the Tribunal must ascertain whether the practice "has had, is having, or is likely to have the effect of preventing or lessening competition substantially." In general, the Tribunal will find a substantial lessening of competition where the anticompetitive acts of the dominant firm preserve or add to the dominant firm's market power.[238] In particular, the Tribunal will ask whether the action creates or strengthens barriers to entry[239] as well assessing the magnitude of this effect.[240] In *NutraSweet* and *Nielsen* the Tribunal indicated that a sort of proportionality test must be applied as well. The more dominant a firm is, the smaller will be the required lessening of competition for an abuse to be found.[241]

The Tribunal must also give consideration to the possibility that the practice is a result of "superior competitive performance." It must not punish firms who achieved their success through fair competition in the marketplace.[242] The Tribunal noted in *NutraSweet* that no provision directs it to take into account efficiencies associated with a dominant firm's abusive behaviour.[243] In *Neilsen* and *Tele-Direct*, however, the Tribunal indicated that efficiencies are relevant to determining whether an act is anticompetitive.[244]

Access to relief under section 79 is limited in several ways. Section 79(5) expressly carves out the exercise of an intellectual property right. Under section 79(6), a three year limitation period is imposed for applications to the Tribunal and section 79(7) provides that no application may be made under section 79 if proceedings have been commenced under the conspiracy provision (section 45) or the mergers provision (section 92).

Application to Anticompetitive Pricing

The types of behaviour referred to in subsections (a), (c), (d) and (i) of section 78 all relate to pricing. More generally, price manipulation may be used by a dominant firm in a wide variety of ways to discipline, deter or eliminate competitors. In the abuse cases so far, however, pricing issues have played a relatively small role.

One of the anticompetitive acts alleged in *NutraSweet* was predatory pricing. Although, ultimately, the Tribunal did not find evidence of predation it made several comments which will undoubtedly inform the manner in which predation will be dealt with in future cases.[245] First, the Tribunal accepted that predation could be an anticompetitive act under section 79 but suggested that the specific reference in section 78(i) to sales below acquisition cost would make it difficult to assert abuse against a manufacturer. The Tribunal noted that only acquisition costs were relevant not other costs such as overhead and distribution. In considering how predation allegations should be addressed under section 79, the Tribunal endorsed the Areeda-Turner test under which pricing below marginal cost is deemed predatory. As discussed above, the Tribunal also noted, as do Areeda and Turner, that average variable cost is a reasonable proxy for marginal cost only so long as the alleged predator has excess capacity. Where the predator is operating at full capacity, average total cost is a better proxy because of the necessity to expand production facilities to increase production.

The Tribunal indicated that predation is not a rational strategy unless there is some prospect of recoupment and accepted that a firm may signal an intention to predate in one market by predatory activity in another.[246] Recognition of this possibility, discussed in Part I, suggests a greater scope for predatory behaviour because it reduces the costs and enhances the prospects of recoupment.[247]

In *Tele-Direct*, price discrimination by the dominant firm which had the effect of discriminating against customers using advertising services consultants who competed with the dominant firm was found to be an indicator of market power.[248] The Tribunal did not find that price discrimination was an abuse of dominance.

Comparison with U.S. and European Union

United States

The abuse of dominance provision has some similarities to the monopolization offence under section 2 of the *Sherman Act*. Maintaining monopoly power through anticompetitive acts and attempting to gain monopoly power through anticompetitive acts where there is a dangerous probability of success are both offences. Monopoly power does not mean 100 per cent of a market. It is sufficient if the alleged monopolist has enough market power to control price and exclude competitors. Typically, this is shown by high market shares, evidence of barriers to entry and certain kinds of behaviour, such as price leadership. In this context, "superior skills, foresight and industry" have been recognized as legitimate bases of market power, as in section 79(4).[249]

If monopoly power is found, it is necessary to show that the monopolist willfully engaged in anticompetitive acts to maintain monopoly power. This may include other conduct addressed on a *per se* or rule of reason basis under antitrust law and, generally, any exclusionary acts which are substantially enhanced or made possible by the possession and exploitation of monopoly power. The quality of the acts will be assessed on the basis of whether the acts, as a whole, have impaired competition in an unreasonably restrictive way.[250]

With respect to attempts to monopolize, the analysis is similar. A court must find an intent to monopolize, but intent is typically inferred from anticompetitive acts used to gain monopoly power. The dangerous probability of success of a monopolization strategy is determined largely by reference to the putative monopolist's market share as well as barriers to entry and the degree of competition in the market.[251]

The two main differences between the Canadian abuse provision and section 2 of the *Sherman Act* are that the *Sherman Act* creates a criminal offence and addresses efforts to become dominant, not just the behaviour of an already dominant firm. Also, as with other U.S. offences, civil liability may also arise under the *Clayton Act*.

Europe

As noted above, Europe has an abuse of dominance provision. As in Canada, dominance has been equated with market power, defined as the ability to prevent effective competition and to behave, to an appreciable extent, independently of competitors, customers and consumers.[252] In order to make such an assessment, a wide range of factors is considered, the same factors as would be taken into account in Canada: market share, barriers to entry and conduct by the allegedly dominant firm. Unlike the approach in Canada and the United States, however, there has not tended to be a specific analytical framework employed in Europe. Also, there is no effect on competition test in Article 82. In determining whether dominance has been abused, factors other than harm to competition are considered including fairness and the entitlement of businesses to be free from coercion by a dominant firm.

Assessment

Dealing with anticompetitive pricing practices under the abuse provision has several advantages. Consistent with the economic analysis set out in Part I, for enforcement action to be taken the perpetrator must have market power and the effect of the alleged anticompetitive acts on competition must be assessed. More than a *per se* regime, the abuse provision allows for a case by case analysis of behaviour which is sensitive to the specific factors at play in a particular industry. It permits the Tribunal to look in a holistic way at the aggregate of anticompetitive acts, which may include more than pricing behaviour, in a way that the narrow criminal provisions do not. This ability will become increasingly important as the structure of industries change in different ways in response to the challenges of the new economy, including increased non-price competition.

The structure of section 79 means that the Tribunal will be able to work out the manner in which competition is being threatened and how it may be encouraged most effectively in particular cases. The Tribunal may make the complex assessments regarding the nature and extent of market power in the new economy where industry specific factors, such as innovative activity, network effects may operate. These factors will be relevant also to assessments of whether acts are anticompetitive and their effect on competition. Finally, in making decisions regarding allegations of abuse, the Tribunal may make the delicate tradeoffs that may be required to ensure between the different dimensions of the purpose clause of the *Act* are fulfilled. The Tribunal will have the difficult task of assessing economic efficiency and deciding to what extent considerations other than economic efficiency are to be taken into account in the context of particular cases.

Proceeding with pricing cases under section 79 does have disadvantages. Because of its market power and competitive effects test, section 79 is much less predictable and certain than the current price discrimination and price maintenance provisions. Given the uncertainty currently surrounding the predatory pricing provision, little would be lost, however, by considering predation under section 79. This lack of predictability will be offset in some significant number of cases by the operation of the market power requirement itself since section 79 does not apply to the behaviour of the large number of firms without market power.

As well, a range of questions arise when one contemplates dealing with pricing cases under section 79. Some commentators have questioned whether the provision can be applied easily to anticompetitive acts in the context of vertical relationships, such as price maintenance and price discrimination.[253] In price discrimination and price maintenance, any anticompetitive effect is likely to be in a market downstream from the market in which the dominant firm is acting. There is, however, no requirement in section 79 that the anticompetitive acts by the dominant firm lessen competition in the same market in which it is dominant.[254] Consequently, lessening competition in the market in which someone buying from the dominant firm sells could be taken into account.

While section 79 could apply to anticompetitive pricing in vertical context, the list of anticompetitive acts in section 78 suggests that addressing vertical anticompetitive acts is not the primary purpose of section 79. Perhaps more significantly, actually doing so would require resolving some new interpretive issues before one could confidently suggest that section 79 would be an effective tool. For example, what would be the appropriate market share threshold for market power? Would it be the 50 per cent, referred to in previous abuse cases, the 35 per cent threshold, referred to in the *Predatory Pricing Enforcement Guidelines*, or some other threshold? Are the determinants of market power the same?

More specifically, the Tribunal would have to develop an analytical framework for assessing when price discrimination and price maintenance are anticompetitive acts. While the Tribunal would be free to do so without the constraints imposed by the existing criminal provisions, the economic analysis in Part I illustrates that doing so is not straightforward. To the extent that the Tribunal were to consider the desirability of traders to be free of coercion in the market place where such considerations conflict with economic considerations of efficiency, its task would become still more complex.

Considering the effect on competition in vertical pricing cases also requires some thought. In price discrimination and price maintenance cases, factors affecting the availability of alternative sources of supply may have to be taken into account. Where price discrimination or price maintenance by a dominant supplier affects only one or a few firms out of many, will there be a basis for finding a substantial lessening of competition? Based on previous Tribunal jurisprudence, Musgrove has suggested that, in its decisions to date, the Tribunal has been willing to act on relatively minor exclusionary effects by firms with very high market share and has focussed on the effect of exclusionary effects on existing market participants rather than barriers to entry.[255] Will this approach have any application to vertical pricing practices? To be specific, will the Tribunal be more concerned about price discrimination and price maintenance, even if it only affects a few firms, where the supplier has a very high market share?

An analytical framework would need to be created to deal with predation cases as well, though dealing with predation is more like the work of the Tribunal in its cases to date. The Tribunal's comments in the

NutraSweet case may form the basis of such a framework. Also, section 79 already includes a market power requirement consistent with the *Predatory Pricing Enforcement Guidelines* and the economic analysis in Part I. Nevertheless, the Tribunal would have to consider how it would adapt its analysis to predation cases. While market definition and market power in the *Predatory Pricing Guidelines* is defined by reference to the tests in the *Merger Enforcement Guidelines*, the Tribunal has adopted different tests. As well, the Tribunal's conception of market power would have to take into account the strategic barriers to entry possibly associated with predation cases, including signalling and reputation effects, discussed in Part I. In assessing the alleged predator's pricing as an anticompetitive act, the Tribunal would need to more fully elaborate its approach to cost/price comparisons, and consider the relevance of intent to predate.

Finally, it is not clear whether the remedies which may be granted under the abuse provision are suitable in pricing cases. The Tribunal has indicated that it is reluctant to grant remedies directed at pricing practices.[256] The Tribunal may be willing to prohibit price discrimination and price maintenance, since such an order would not amount to regulating prices and could be readily monitored. It is less obvious that it would be willing to order a firm to stop predating, since doing so would be tantamount to price regulation and assessing whether the predator is in compliance would be almost as complicated as finding predation in the first place.[257]

In light of all these issues, a number of Tribunal decisions will be required before the manner in which the abuse of dominance provision operates in relation to pricing cases would be well understood.

Part III Enforcement of *Competition Act* Provisions by the Bureau

Introduction

This part of the report describes the Competition Bureau's enforcement of the provisions in the *Competition Act* dealing with anticompetitive pricing practices. A brief overview of the process by which the Bureau deals with complaints is provided followed by a statistical profile of the Bureau's enforcement experience. The profile consists of detailed statistics for all complaints dealt with by the Bureau over the five (5) year period beginning April 1, 1994 and ending March 31, 1999 (the "*Review Period*")[258] which concerned price discrimination, predatory pricing or price maintenance. Some observations based on the extensive interviews conducted by the authors with Bureau staff and selected stakeholders are also offered. Finally, in light of these statistics, the Bureau's enforcement criteria are assessed and some conclusions are drawn regarding the effectiveness of the Bureau's enforcement activities.

Complaints Process

Complaints are received by the Competition Bureau in a variety of ways through the Bureau's Information Centre, including telephone calls, letters addressed to the Bureau and email through the Bureau's Web site. When the Information Centre receives a complaint that may relate in any way to the *Act*, it is entered in the Bureau's computer filing system (called the "*tracker*") and referred to the one of the Bureau's Branches, where it is assigned to a commerce officer. Pricing complaints are dealt with by either the Criminal or Civil Branch.

Complaints are also commonly referred to the Bureau by members of parliament, government ministers or officials in other branches of government who have received a complaint. The *Competition Act* provides that the Commissioner may self initiate an investigation in circumstances where an issue has come to the Commissioner's attention. Finally, there is a formal procedure in section 9 of the *Act* under which any six (6) residents may make a complaint to the Bureau. When this process is used, a formal inquiry must be initiated by the Commissioner.

Bureau commerce officers are responsible for making a preliminary assessment of each complaint received. Typically the officer begins by contacting the complainant and follows up by collecting and analysing information relevant to the complaint. In cases where the responsible commerce officer determines that the complaint does not disclose any basis for proceeding under the *Act*, the officer may terminate the investigation. If, after a preliminary assessment, it appears to the officer and his or her supervisor that there is a basis for a more thorough review, a complaint is designated as a "project" and further work is done, including applying the case selection criteria developed by the Bureau, gathering more complete information and identifying and assessing the strength of evidence. In some circumstances, an opinion may be sought from the Economics and International Affairs Branch, either on what economic evidence is needed or on how to develop an economic theory of the case. Advice may be sought as well from the Department of Justice regarding particular legal issues.

In light of the results of the application of the case selection criteria and this more comprehensive analysis, a decision is made as to whether the case has sufficient merit to justify going forward to the next stage, the commencement of an inquiry by the Commissioner. Once an inquiry has been commenced the Commissioner can use his formal investigative powers, including seeking an order directing a person to be examined under oath[259] or a warrant authorizing the searching of premises and the seizing of documents.[260] Typically at the inquiry stage a team is set up to deal with the complaint, though this is often done earlier.

As noted, an inquiry must be initiated when a six (6) resident complaint is received. The Commissioner may initiate an inquiry in other circumstances where he or she believes on reasonable grounds that an offence has been or is about to be committed or that grounds exist for the Tribunal to make an order in relation to one of the provisions in the civil part of the *Act*.[261] The Minister of Industry may also direct the Commissioner to inquire as to whether either of these circumstances exists.[262]

At any stage of an inquiry, the Commissioner may refer a matter to the Attorney General of Canada for consideration as to whether an offence has been committed under the *Act*.[263] The Attorney General must then decide whether to prosecute.[264] In relation to a complaint under the civil provisions, the Commissioner may make an application for relief to the Tribunal.[265]

Alternatively, at any stage, the investigation of a complaint may be terminated or some kind of alternative case resolution ("*ACR*") reached. An ACR may take various forms from a simple information visit by Bureau staff to explain the *Act* to formal undertakings monitored by the Bureau and consent prohibition orders. If an inquiry has been commenced, only the Commissioner may discontinue it. On discontinuing the inquiry, the Commissioner must make a report to the Minister of Industry showing the information obtained and the reason for discontinuing the inquiry as well as advising the complainants and giving them the grounds for the decision to discontinue.[266] If no inquiry has been commenced, the Bureau may decide to terminate the investigation or seek an ACR at any stage.

Statistical Record of Enforcement Experience

The following tables provide a profile of the manner in which all complaints received and completed within the Review Period were dealt with. With the assistance of the Bureau staff, all electronic records on the Bureau's tracker system and all physical files relating to complaints made and disposed of within the Review Period which were considered under the main criminal provisions dealing with price discrimination, predatory pricing and price maintenance (sections 50 and 61) and all complaints relating to pricing dealt with under section 79, the abuse provision, were identified. The profile is based on our review of all relevant electronic records and physical files within the Review Period.

*Overview of Enforcement During Review Period - All Pricing Complaints**

	Price Discrimination	Predatory Pricing	Price Maintenance	TOTAL
Complaints** (including projects)	88 (9%)	382 (41%)	461 (50%)	931 (100%)
Projects	13 (20%)	27 (40%)	26 (40%)	66 (100%)
Inquiries	5 (26%)	7 (37%)	7 (37%)	19 (100%)
Formal Enforcement Proceedings	0	0	3 (100%)	3 (100%)
Alternative Case Resolutions	4 (4%)	9 (10%)	77 (86%)	90 (100%)

* Includes all complaints dealt with under the relevant criminal provisions and complaints under the abuse of dominance provision relating to pricing. Complaints in the tracker not identified by section were not reviewed, though it is likely that some related to pricing. That no section number was identified, however, suggests that complaints did not involve the elements of the identified anticompetitive pricing practices: price discrimination, predatory pricing and price maintenance.

** In compiling these statistics, we attempted to avoid double counting cases considered by both Civil Branch and Criminal Branch.

Even viewed at this level of aggregation, some observations may be made regarding the Bureau's enforcement activities during the Review Period. Most significantly, very few cases rose to the level of the more intensive review characterizing the project stage. Of the complaints which did become projects, in fewer than 1/3 was an inquiry initiated and formal enforcement proceedings were extremely rare. By contrast, ACR's were successfully used in about 10% of complaints. Most complaints (88%) were terminated by commerce officers and their supervisors. The critical role played by commerce officers underlines the importance of ensuring that commerce officers have the appropriate tools to differentiate complaints that have merit from those that do not.

Price maintenance was the most frequently complained about anticompetitive pricing practice, though it was fairly closely followed by predatory pricing. Price maintenance was also the most likely to be the subject of the Bureau's use of formal enforcement proceedings, though the number of occasions on which formal enforcement occurred was very small even in price maintenance cases.

With respect to price maintenance, the rare use of formal enforcement during the Review Period represents a significant change in enforcement policy from years before the Review Period. Stanbury's study found that formal enforcement actions against price maintenance reached a high of 58 in the five year period from

1981 to 1985, falling to 38 from 1986 to 1990 and 10 from 1991 to 1995. As discussed in more detail below, formal enforcement activity has been largely replaced by some form of alternative case resolution.[267]

In contrast to price maintenance, the number of formal enforcement actions with respect to price discrimination and predatory pricing has never been substantial. That there were none during the Review Period is consistent with earlier enforcement activity.[268] Moreover, unlike price maintenance complaints, the proportion of price discrimination and predatory pricing complaints resolved through alternative case resolutions during the Review Period was very small.

Notwithstanding the pervasiveness of price discrimination as described in Part I, the number of price discrimination complaints is a relatively small proportion of the total. There may be several of explanations for this. The *Price Discrimination Enforcement Guidelines* are very specific regarding how the Bureau interprets the price discrimination provision, section 50(1)(a) and, in light of this high degree of predictability, businesses are able to implement compliance programs successfully. Some industry organizations interviewed for this study suggested that they were able to obtain compliance with the provision by advising the businesses with which they dealt of its requirements. Consequently, one must be careful about concluding that the provision is ineffective simply based on the relatively small number of complaints.

Another interesting feature of the statistics on price discrimination is that, of the small number of complaints, there would seem to be a disproportionately high number of projects and inquiries. This apparent anomaly may be explained in part by the fact that all five (5) complaints in which inquiries were commenced were initiated using the six (6) resident process described above under which the Commissioner is obliged to commence an inquiry.

*Disposition of Price Discrimination Complaints During the Review Period**

Disposition of Complaint		Civil Complaints		Criminal Complaints		TOTAL
		Complaints	Projects	Complaints	Projects	
Inquiries		-	-	1	4	5
Enforcement Proceedings		-	-	-	-	-
Alternative Case Resolutions		-	1	1	2	4
Terminated (Total)		3	5	71	5	84
BASIS	Withdrawn	-	1	17	2	21
	Insufficient Information	1	-	4	1	6
	Not Related to *Act*	-	-	4	-	4
	Failure to meet Requirements of *Act*	1	3	39	3	46
	Other**	1	1	7	-	9

* 1994-95 to 1998-99.

** Other includes primarily situations in which the reason for termination was not clear.

*Disposition of Predatory Pricing Complaints During the Review Period**

Disposition of Complaint		Civil Complaints		Criminal Complaints		TOTAL
		Complaints	Projects	Complaints	Projects	
Inquiries		-	2	-	4	6
Enforcement Proceedings		-	-	-	-	-
Alternative Case Resolutions		3	1	3	2	9
Terminated (Total)		23	12	324**	12	371
BASIS	Withdrawn	4	5	84	4	103
	Insufficient Information	2	2	48	1	52
	Not Related to *Act*	2	-	19	-	21
	Failure to meet Requirements of Offence	13	5	200	7	225
	Other***	2	-	57	-	59

* 1994-95 to 1998-99.

** The total number of criminal complaints terminated is less than the total bases of termination indicated because some complaints were terminated on multiple bases.

*** Other includes primarily situations in which the reason for termination was not clear.

*Disposition of Price Maintenance Complaints (including refusal to supply) During Review Period**

Disposition of Complaint		Civil Complaints		Criminal Complaints		TOTAL
		Complaints	Projects	Complaints	Projects	
Inquiries		-	-	-	7	7
Enforcement Proceedings		-	-	-	3	3
Alternative Case Resolutions		1	-	69	7	77
Terminated (Total)		19	-	344**	18	381
BASIS	Withdrawn	3	-	90	5	98
	Insufficient Information	4	-	121	2	127
	Not Related to *Act*	8	-	93	-	101
	Failure to meet Requirements of Offence	-	-	5	7	12
	Other***	4		41	4	49

* 1994-95 to 1998-99.

** The total number of criminal complaints terminated is less than the total bases of termination indicated because some complaints were terminated on multiple bases.

*** Other includes primarily situations in which the reason for termination was not clear.

Several observations may be made regarding this more detailed breakdown of pricing cases. The Civil Branch deals with relatively few pricing cases. This is especially true in relation to price maintenance. This result is consistent with the comments of most officers who indicated that pricing cases likely would go first to Criminal Branch unless there was some clear suggestion that the perpetrator was dominant and there were additional anticompetitive acts. As discussed in Part II, section 79 could be used to deal with pricing practices. Looking at the complaints dealt with in the Review Period suggests that this did not occur during the Review Period in a significant way, perhaps owing to the uncertainty surrounding how precisely the abuse provision would be applied. It may also be, simply, that, in most pricing complaints, the allegation did not involve a dominant firm.

If one eliminates the complaints which were withdrawn, where insufficient information was provided or which were not related to the provisions of the *Act*, it is possible to get a sense of the number of cases rejected on the merits during the Review Period: price discrimination - 55 out of 84, predatory pricing - 284 out of 371 and price maintenance - 61 out of 381. Even these figures may be somewhat inflated since they include all the cases designated as "other". For most of these cases, it was not possible to discern the disposition of the complaint from the Bureau's records. Nevertheless, in at least some of these cases, undoubtedly, a conclusion was reached that there was no substantive basis for going forward with the complaint. One striking feature of these figures is how few price maintenance cases were rejected on the merits. This may be explained in part by the large number that were found not to be related to the provisions of the Act (101 out of 381), as compared to price discrimination (4 out of 84) and predatory pricing (21 out ouf 371), where most terminated cases were rejected on the merits. The difference may reflect the very specific requirements for price maintenance as compared to the requirements for predatory pricing expressed in the *Predatory Pricing Enforcement Guidelines*. Allegations regarding market power and price/cost comparisons will almost always be contestable, whereas an assessment of whether the elements of price maintenance are present is relatively straightforward. The differences in the statistics for price discrimination and price maintenance cannot be explained in this way because the elements of price discrimination are relatively specific as well.

*Complaints and Projects by Industry During Review Period**

Industry	Percentage of Total Complaints (including projects)	Percentage of Total Projects
Gasoline	16.7%	7.5%
Groceries	1.5%	9.1%
Concrete	1.1%	3%
Telecommunications	2.9%	18%
Waste	2.5%	9.1%
Other	75.3%	53.3%**

* 1994-95 to 1998-99.

** No other industry accounted for more than 2% of projects.

As illustrated in the table above, complaints are received from a wide variety of industries. With the notable exception of gasoline, no single industry appears to be the source of a disproportionate number of complaints. When one examines the incidence of projects by industry, however, there are certain industries in which there are serious enough concerns that projects were commenced in a significant number of cases: gas, groceries, telecommunications and waste, together accounting for almost 50% of total Bureau projects relating to pricing. It is also notable that the overwhelming significance of gasoline in complaints did not follow through into projects, where groceries, telecommunications and waste were all more frequently the subject of the more thorough investigations to which projects are subject.[269]

Other Observations on Enforcement Practice

It is possible to add several observations based on the review of project files and interviews with Bureau personnel. With one exception, the Bureau has not attempted to create specialized expertise related to pricing complaints. The exception is in the area of price maintenance. One commerce officer has developed a specialization in dealing with these cases, extensively and successfully employing alternative case resolution strategies.

Certain officers have acquired extensive experience in industries in which concerns about pricing problems appear to be endemic, such as gasoline, telecommunications and waste. Recognition of the experience and insight of officers with such industry specific expertise means that they tend to be involved as new complaints reach the Bureau within their areas. There is also increasing inter-branch cooperation to take advantage of such expertise, not only between Criminal and Civil Branches but between these branches and the Mergers Branch. This may take the form of information sharing, consultation or even temporary secondment of personnel. So far such cooperative leveraging of expertise has not been institutionalized to a significant extent, though several commerce officers have been designated as responsible for dealing with the high volume of gasoline complaints, most of which relate to pricing.

Finally, all officers interviewed in the Criminal Branch indicated that they rigorously applied the *Predatory Pricing Enforcement Guidelines* and the *Price Discrimination Enforcement Guidelines* in their analysis of cases. This conclusion was confirmed by the review of tracker records and project files. Indeed, even in pricing cases dealt with under section 79, where the complaint related to predation, the *Predatory Pricing Enforcement Guidelines* tended to inform the application of the statutory framework.

Case Selection Criteria

Introduction

Both the Criminal Branch and the Civil Branch, as well as the other branches at the Bureau, have adopted case selection criteria to ensure that competing priorities are evaluated in a systematic way and that resources within each branch are efficiently allocated. Since 1996, in an effort to create a system to facilitate the assessment of competing priorities across branches and ensure that total Bureau resources are allocated efficiently, the criteria used in each branch have had a common core of identical factors. Under each core factor, each branch uses additional supplementary factors to reflect considerations unique to its operations. Numerical weights are given to each factor. In applying the factors to a particular case, a score is given in relation to each factor reflecting its significance in that case. The total score is used to assess the desirability of proceeding with formal enforcement action. The Bureau is currently undertaking a review to determine whether further harmonization of the case selection criteria across branches is possible and desirable.

As noted above, the application of the criteria, which requires a fairly complex analysis, takes place around the time the Bureau makes the decision to make a complaint a "project" and to subject it to a more thorough investigation. In making this decision, the results of the application of the criteria are not followed mechanistically. The criteria are designed as an aid to management decision making, not a substitute for management discretion.

In an era of continually shrinking resources, it is essential for any government organization to put in place systems which will assist it to marshal its resources most effectively to accomplish its mandate.[270] In the case of the Bureau, its responsibilities have increased as deregulation has moved a greater proportion of business activity into the private market place and as a consequence of the major amendments to the *Act* in 1986 and in 1999. As well, internal reorganization, including the establishment of a permanent unit responsible for amendments to the *Act*, has reduced the resources available for enforcement activity. Its expanding responsibilities have not been accompanied by large increases in the Bureau's budget.[271] In response to its expanded responsibilities and constrained resources, the Bureau has established priorities in its enforcement activity which are reflected in its case selection criteria.

For the purposes of this study, the question is whether the case selection criteria are appropriate in relation to the enforcement of the provisions of the *Act* dealing with anticompetitive pricing practices. This is a narrow focus. It does not permit us to address the general effectiveness of the criteria or the relative importance accorded to pricing practices as compared to the enforcement of other provisions of the *Act*. In the following sections, we describe, in general terms, the case selection criteria and how they deal with anticompetitive pricing complaints, followed by our assessment.

Description of Case Selection Criteria

The following overview of the case selection criteria used by the Bureau is based largely on the criteria applied by the Criminal Branch which are specifically adapted to address pricing cases. The factors in the Criminal and Civil criteria, however, are essentially the same, though they are sometimes allocated into different categories and assigned different weights. The common core of the case selection criteria consists of four (4) categories of factors:

1. Economic Impact
2 Enforcement Policy
3. Strength of the Case
4. Management Considerations

The economic impact of the alleged anticompetitive activity is considered by reference to several subcategories, including the following: what volume of commerce is affected; what is the market power of the person alleged to have engaged in an anticompetitive act (determined by reference to market shares and barriers to entry); are prices expected to rise, by how much and over what period; and the length of time that practice has been engaged in. Under the Civil criteria, the effect on any aspect of competition, not just the effect on price, is taken into account.

With respect to enforcement policy considerations, again there are a number of subcategories of factors which are taken into account. The only pricing practice addressed in this study which is accorded priority in enforcement under the Criminal criteria is horizontal price maintenance. Under the Civil criteria, abuse of dominance is a priority, though, as noted above, pricing cases typically have not been dealt with under section 79. Several other factors which point in favour of formal proceedings are (1) the deterrence value of a formal enforcement action, (2) the jurisprudential value of a decided case, (3) whether the alleged perpetrator has a history of engaging in anticompetitive acts, (4) whether the behaviour is covert and (5) the geographic scope of the offence. Under a separate category, a case also receives points, however, if the matter can be resolved through an ACR. Finally, "public sensitivity" in the sense that the case is likely to attract significant public attention also leads to a higher score.

The third category in the Criminal criteria, strength of the case, refers to specific offences. In all cases, the strength of both documentary evidence and witnesses are assessed. For predation, the only issues in the criteria are (1) the market power of the alleged predator, based on market shares, their stability over time, barriers to entry and the existence of other large rivals, (2) whether prices are less than average variable cost and (3) whether low pricing is a policy. The analysis for price maintenance is much more straight forward reflecting the degree of certainty in the law. The only issue is the evidence on the existence of an attempt to maintain prices by "agreement, threat, promise or other means," or of a refusal to supply because of low pricing. No reference at all is made to price discrimination though the Bureau's files disclose that the case selection criteria are applied to price discrimination cases. The Civil criteria refer only to the likelihood that a case will be successful.

Management considerations, the fourth category, involves a consideration of the financial resources and investment of personnel time needed to bring the case to its anticipated conclusion. The longer a case is likely to take and the more financial and human resources that will be required, the lower the score on this factor. The urgency of proceeding with the case is a basis for an increased score.

Application to Pricing Practices

From the interviews conducted for this study, it is clear that the case selection criteria are used as a guide to management decision making not a substitute. Often, it was suggested that if a case was considered to have sufficient merit, it could be proceeded with notwithstanding a low score. It was also suggested that the criteria were most important in the rare situation when several cases arose at the same time and resource constraints would not permit the Bureau to pursue them all. Consequently, while as discussed below, there are several aspects of the case selection criteria which may tend to produce low scores when applied to pricing cases, it seems that they would not necessarily prevent a meritorious case from proceeding.

The most obvious aspect of the case selection criteria which would work against high scores in pricing cases as opposed to some other kinds of cases is that the only pricing practice addressed in this study which is identified as an enforcement priority is horizontal price maintenance. Other aspects of the case selection criteria would appear to have differential effects of pricing cases depending on the nature of the case.

With respect to market power, it may be expected that many price discrimination and price maintenance cases which have merit based on the provisions of the statute will not be favourably judged since market power is not required under the *Act* for these offences. The economic analysis in Part I suggests that market power is a necessary condition for most price discrimination and price maintenance to be anticompetitive so market power may be an appropriate consideration. Nevertheless, its application creates a gap between what the statute contemplates and what the Bureau does which does not occur where market power is expressly identified as an element of the regulated behaviour. With respect to predation, there is no statutory market power test either, but imposing market power as an enforcement criterion is consistent with the Bureau's *Predatory Pricing Enforcement Guidelines*. Market power is required under the abuse provision.

Geographic scope is another factor in the Criminal criteria which often will not be present in price discrimination or price maintenance cases, since our review of Bureau files disclosed that many such cases involve a single supplier and single customer. Our review suggests that it is likely to be rare in predation cases as well, most of which involved local markets. Geographic scope is not separately referred to in the Civil criteria.

The likelihood of success using an ACR approach is high in price maintenance cases but relatively low in price discrimination cases and predatory pricing cases based on the statistical profile above. This seems to have an ambiguous effect under the case selection criteria. Cases are scored higher if a prosecution or application to the Tribunal is thought to be needed based on the history of the perpetrator and the need for deterrence, in other words when an ACR is not feasible. At the same time, if an ACR is a reasonable strategy, this is also accorded points. The likelihood of a successful ACR would also result in a more positive score under management considerations, while contested cases taken all the way to a contested trial or application to the Tribunal would score very poorly. On balance, given the significant weight accorded to management considerations, it would appear that cases which are good candidates for ACR's are likely to score higher than cases which are not. This would seem to systematically favour price maintenance cases and disfavour predation cases, where the only enforcement options are a long drawn out trial or application to the Tribunal with heavy commitments in terms of the financial and human resources of the Bureau, including the hiring of outside experts. The effect on price discrimination is less clear. One would expect that a prosecution or application to the Tribunal in relation to price discrimination would be much more straight forward and therefore quicker and less expensive. On the other hand, the statistics on resolving price discrimination cases through ACR's show that the likelihood of resolving price discrimination cases thought ACR's has been poor.

Price changes would seem to be very difficult to find in price discrimination and price maintenance cases since, only one person in the market may be adversely affected. By contrast, in predation as interpreted by the Bureau, the effect on prices is central to the analysis. By contemplating other anticompetitive effects, the Civil criteria are more permissive in this regard.

Regarding the strength of the case category, price maintenance cases are likely to be assessed either very favourably or very unfavourably, since the evidence on the narrow elements required to be met will be present or it will not. By contrast, the strength of evidence in a predation case will rarely be assessed in a highly favourable way. The elements will always be difficult to assess much less to prove. As well, there is no possibility to bolster the assessment of a predation case with evidence of intent to eliminate a competitor or to lessen competition substantially. Only evidence on the two dimensions of the two part test and the existence of a policy count. Indeed, the case selection criteria are more stringent than the *Predatory Pricing Enforcement Guidelines* in this regard because they only permit consideration of pricing below average variable cost. No comment may be made on the application of this factor to price discrimination because price discrimination is not mentioned.

Finally, the case selection criteria give more weight to cases where there is a large economic impact. Not only is the volume of commerce affected identified specifically, but also the geographic scope of the market, a proxy for economic impact is counted. As well, market power and public sensitivity may suggest economic importance. This approach means that cases are less likely to be brought forward which are meritorious in terms of the provisions of the *Act* if their economic impact is small.

Does the emphasis on the economic impact of anticompetitive behaviour in the case selection criteria limit access to relief for small businesses? The answer will depend on the circumstances. A small business hurt by anticompetitive activity may operate in a big market and, to the extent that a behaviour is widespread or engaged in by a dominant firm, the size of the victim complaining will not be an impediment. As well, where multiple complaints are made with respect to the same behaviour, the likelihood that the Bureau will proceed will be enhanced.

To the extent that the criteria do tend to limit small business access to relief in court or before the Tribunal, other types of relief may be available. Particularly where low volumes of commerce are at stake, the Bureau has tied to work toward ACR's, ranging from visits to the alleged perpetrator to advise it on the requirements of the *Act*, to more formal resolutions involving undertakings to the Bureau and monitoring. The Commissioner has promoted a continuum of case resolution strategies to provide faster, cost effective relief. As the statistics set out above indicate, this has been extremely successful in relation to price maintenance complaints, but much less so for price discrimination and predatory pricing. Finally, our review of project files examined disclosed substantial time and effort expended by Bureau officers on complaints in which the volume of commerce at stake was relatively small but where there was a serious issue on the merits, suggesting that small business complaints are taken seriously.

In sum, the case selection criteria include factors which will tend to both enhance and reduce the score of pricing cases, depending on the specific anticompetitive behaviour concerned. This is inevitable in the application of any general criteria to a range of different behaviours.

In relation to price discrimination and vertical price maintenance cases the low priority attached to enforcement and the significance given to the economic impact of the anticompetitive conduct under the case selection criteria may lead to lower scores. In the case of price maintenance, this negative effect may be significantly offset because of the likelihood and availability of ACR's which may improve scores as well as providing a meaningful alternative to prosecution. Also, meritorious price maintenance cases are likely to receive high scores on the strength of case criterion.

With respect to predation cases, several features of the Criminal criteria seem likely to reduce scores in most cases. Like price maintenance and price discrimination, predation cases also are not a priority and tend to be in local markets in which the volume of commerce may be low. As poor candidates for ACR's, the only option for resolving a predation case is likely to be a drawn out prosecution which will score poorly on the management consideration criteria. Given the analytical and evidentiary challenges associated with meeting the two part test, the restrictive cost/price comparison and the lack of recognition of intent evidence, predation cases are unlikely to score well under the strength of case criteria either.

The more flexible and open ended Civil criteria may not have the same limiting effects in cases of predation because the strength of case category plays a less significant role and in relation to price discrimination and price maintenance because a broader conception of anticompetitive effect is taken into account. Nevertheless, the overall structure of the Civil criteria are the same as the Criminal criteria and no specific priority is accorded to pricing cases. Consequently, there is no reason to expect dramatically different results in the application of the Civil criteria to pricing cases.

Assessment of Enforcement Experience

The statistical profile of Bureau enforcement activity tends to support the conclusion that the likely impact of the application of the case selection criteria to pricing cases will be that few cases will be the subject of formal enforcement proceedings. Whether this is a concern, however, depends upon several other considerations: (1) is the application of the case selection criteria along with the Bureau's enforcement guidelines likely to result in accurate decisions regarding enforcement based on the considerations set out in Part I? (2) is a low level of enforcement activity appropriate given alternative uses of Bureau resources? (3) will the criteria result in sufficient formal enforcement activity?

1. *Accuracy of Enforcement Decision Making*

If the application of the case selection criteria and the Bureau's enforcement guidelines are likely to result in accurate enforcement decisions, consistent with the economic analysis in Part I, then the limited use of formal enforcement powers would be less of a concern. Each type of anticompetitive pricing practice is discussed in turn.

Price Discrimination: The difficulty of making a strong economic case against price discrimination suggests that the Bureau should adopt a cautious approach to enforcement. The interpretive approach adopted in the *Price Discrimination Enforcement Guidelines*, for the most part, reflects such caution. A broad interpretation is given to the circumstances in which charging different prices to different customers should be permitted. Similarly, the factors in the case selection criteria focussing on whether the seriousness of anticompetitive effect show appropriate restraint. Neither the *Guidelines* nor the case selection criteria provide a fully developed analysis of when price discrimination is anticompetitive. As demonstrated in Part I, such an analysis is elusive. Nevertheless, the case selection criteria do focus on considerations which our economic analysis in Part I suggests should be relevant: market power, duration of the activity and its anticompetitive effect.

Predatory Pricing: The *Predatory Pricing Enforcement Guidelines* set out a framework for analysing predatory pricing which is generally consistent with economic theory though its application may lead to a narrower view of predation than current economic theory would suggest because of its relative lack of emphasis on strategic behaviour. The sections in the Criminal case selection criteria addressing the strength of predation cases do not improve on the *Predatory Pricing Enforcement Guidelines* and, in fact, narrow the inquiry. As a consequence, some cases which would meet the requirements of the *Guidelines* will rank poorly. This raises some concern regarding the effect of the criteria on the accuracy of enforcement decision making.

Price Maintenance: The sections in the Criminal criteria dealing with assessing the strength of case in price maintenance reflect the *Competition Act* provision but, in doing so, do not take into account possible efficiency justifications for price maintenance. The case selection criteria do require consideration of market power and anticompetitive effect, however, which may permit consideration of efficiencies. To this extent, the criteria appear to provide the basis for an accurate assessment from an economic point of view.

2. *Priority to be given to anticompetitive pricing practices as compared to other Bureau Activities*

Our review was focussed exclusively on the pricing provisions of the *Competition Act*. Consequently, it is impossible to pronounce on the appropriateness of the criteria in light of resource constraints and competing priorities. To do so, it would have been necessary to do a complete inventory of all the Bureau's activities and assess their relative importance. Nevertheless, it is possible to ask whether the criteria focus on the aspects of anticompetitive pricing behaviour which indicate the magnitude of anticompetitive effects. In general, the answer is that they do. Market power, volume of commerce, geographic scope and public sensitivity will all be important indicators of the seriousness of the effect of the anticompetitive activity. The criteria also reflect some consideration of the egregiousness of the anticompetitive behaviour. In terms of enforcement policy, whether behaviour is covert and whether the perpetrator has a history of anticompetitive acts are factors adding weight to the case assessment.

3. *Sufficiency of formal enforcement activity*

Given our inability to assess competing priorities within the Bureau, we do not offer a conclusion on whether a sufficient number of cases is being brought. Nevertheless, it is possible to offer some observations. The statistics show that few cases have been pursued to resolution, except through ACR's in price maintenance complaints. The relative absence of formal enforcement proceedings raises several concerns regarding the certainty and, ultimately, the effectiveness of the law. More formal enforcement proceedings would force the courts and the Tribunal to progressively refine the law, making clear its appropriate application as well as signalling the seriousness of the Bureau's intent to enforce it. More cases would also expose the weaknesses in the law which would, in turn, be an important catalyst for law reform. One might hope and expect that increasing certainty brought about by greater formal enforcement activity by the Bureau would encourage greater interest in private actions under section 36. To date the possibility of civil actions alleging violation of the criminal provisions has been little used.[272]

In the absence of formal enforcement proceedings, the efforts of the Bureau to clarify its interpretation of the law for enforcement purposes have been extremely useful. Indeed, enforcement guidelines have some major advantage over case law. Guidelines may be produced much more cheaply and may be written to address issues more comprehensively than an accumulation of decisions each of which deals with only a specific set of facts and may have limited application to other situations.[273] Guidelines increase the likelihood of consistent and accurate decision making by commerce officers who make the difficult assessments of cases at the critical preliminary assessment stage. By disclosing a clear approach to enforcement, guidelines may facilitate ACR's and, more generally, will ease the compliance burden for business.

Nevertheless, such an approach is subject to inherent limitations. Bringing some minimum number of cases is essential if the private sector is to regard enforcement activities as a credible threat and an incentive to comply with the law. This is not to suggest that the Commissioner's substantial efforts to seek voluntary compliance are wrong headed. The investment in general education regarding the *Competition Act* and its enforcement, targeted information campaigns, advisory opinions, advanced ruling certificates with respect to proposed mergers are all useful strategies, especially in the face of constrained resources.[274] At some point, however, formal proceedings are needed to demonstrate the seriousness of the Bureau's intent to enforce the *Act* and to ensure that these voluntary compliance strategies are effective.

Also, guidelines are not binding on the Bureau, the courts or the Tribunal and are no defence to private actions under section 36. While enforcement action in relation to activities complying with Bureau guidelines may be practically unlikely, there is a residual risk of enforcement which impairs their reliability as compared to case law. This risk will be exacerbated to the extent that guidelines suggest interpretations which appear to be at odds with the statute.

As discussed in Part II there are several ways in which the *Price Discrimination Enforcement Guidelines* and *Predatory Pricing Enforcement Guidelines* adopt interpretations which stretch the provisions of the *Act*. In the case of *Predatory Pricing Enforcement Guidelines*, the elaborate two step test for predation has not been fully endorsed in the limited case law. As well, the *Guidelines* downplay of the role of intent and the significance of eliminating competitors both of which are referred to in the criminal predatory pricing provision. The *Price Discrimination Enforcement Guidelines* adopt interpretations regarding when terms are available to competitors and when a sale occurs which have been criticized as inconsistent with the statute.

When one examines the case selection criteria, one finds additional criteria not specified in the *Act*. As suggested above, most of these additional criteria may be justified either on the basis of the economic analysis in Part I or prudent management of limited resources. Nevertheless, by applying criteria to the enforcement of the *Act* in relation to pricing practices which are extraneous to the statute and tend to reduce the likelihood of enforcement action in pricing cases, both the *Guidelines* and the case selection criteria may give rise to several concerns. A disjunction is created between the expectations of people complaining to the Bureau about pricing practices and what the Bureau is prepared to deliver. This is most serious, in relation to price discrimination and predatory pricing, where the complete absence of formal enforcement actions opens the Bureau to the charge that it is choosing not to enforce the *Act*. This suggests either that the case selection criteria be revised so as to minimize impediments to bringing pricing cases and that the *Guidelines* be revised to more closely follow the *Act* or that the provisions be reformed to provide clearer direction for bureau enforcement policy. Either way, the result would be closer coincidence between what the law says and the Bureau's enforcement policy.[275]

Part IV Elements of a Competition Regime - Summary and Conclusions

Introduction

Dealing effectively with anticompetitive pricing is fraught with challenges. Both identifying pricing behaviour that is anticompetitive and designing legal rules which permit effective and timely enforcement actions are difficult. In this part, we summarize the results of our review and draw some conclusions regarding the Canadian rules on anticompetitive pricing and their enforcement.

Conclusions Regarding Specific Types of Anticompetitive Pricing Practices

Price Discrimination

Adequacy of Existing Provisions - There is no question that the current criminal price discrimination provision is not adequate to address anticompetitive price discrimination. The economic analysis in Part I concludes that price discrimination is not anticompetitive in many circumstances. Whether there is any possibility that price discrimination will have an anticompetitive effect will depend on the facts of each case. The current provision does not require the discriminating supplier to have market power, a prerequisite to true discrimination, nor does it require any assessment of the effect of discrimination on competition. To this extent the provision is over-inclusive. At the same time, by failing to include discrimination in services and discrimination in forms of transactions other than sales, the provision excludes important areas of economic activity in the contemporary marketplace.

In its present form, the criminal price discrimination provision is not an accurate tool for addressing anticompetitive behaviour and imposes excessive compliance and monitoring costs on business. Because price discrimination is a criminal offence, this chilling effect is exacerbated.

This conclusion may be supported by reference to a specific problem with the current criminal provision which was disclosed in the study. Section 50(1)(a) does not accurately reflect the legitimate bases upon which customers may be treated differently. The economic analysis in Part I suggests that only differences in the costs of serving different customers rather than simply differences in quantity and quality, should be adopted as the standard. The requirement that discrimination relate to articles of like quality and quantity are partial and imperfect proxies for the different costs of serving customers.

Certain elements of the existing provision do require consideration of factors that the economic analysis in Part I suggests are relevant. The requirement for a policy of price discrimination screens out price discrimination that is transitory, perhaps as a consequence of changes in supply or demand or to meet price changes by competitors. The requirement that non-discriminatory pricing be "available" to competitors is also consistent with economic theory. So long as either is present, there is no true discrimination.

Dealing with price discrimination as a species of abuse of dominance under section 79 has the potential to address some of the defects in the criminal price discrimination provision. Treating price discrimination as a matter subject to civil review would be consistent with the manner in which other vertical behaviour is dealt with in the *Act*. The abuse provision incorporates the market power test which economic theory identifies as a prerequisite to discrimination and requires there to be an assessment of the effect of the discrimination on competition.

Nevertheless, applying section 79 to price discrimination complaints faces several challenges. The approach to market power in the abuse provision may have to be adapted for price discrimination cases. Consideration will have to be given to the appropriate market share threshold. A test which specifically takes into account the availability of alternative sources of supply, as in the refusal to deal provision,[276] may need to be developed for assessing competitive effect. As well, thought will have to be given to how to assess competitive effects when the dominant firm operates in a different market from that in which the person who is affected carries on business. It is not clear whether even substantial effects on a single or small number of firms would justify a finding of substantially lessening competition under the abuse provision.

Dealing with price discrimination under section 79 would be much less certain and predictable than the criminal price discrimination in practice. There are two answers to this legitimate concern. First, compliance costs will increase only for market participants who have sufficient market power to meet the threshold for the application of the provision. Even these firms need to worry about their behaviour only if it meets the substantial lessening of competition test. While such a test is admittedly less certain and predictable than the requirements of the current provision, it is a higher threshold and similar to standards in the *Act*'s other civil provisions. For the vast majority of firms without market power, section 79 will have no application, so their compliance costs will be much less than under the current regime. Second, the approach taken under section 79 would be at least as predictable as the current standard in the U.S. and Europe and could be fleshed out by Tribunal decisions.

Dealing with price discrimination under the abuse of dominance provision provides a process which would permit the Competition Tribunal to achieve an accommodation of the prescriptions of economic theory and the interests of individual businesses in being protected against being discriminated against by their suppliers. The weight of economic theory suggests that the purpose of the *Act* should be the protection of competition in the interests of efficiency and not individual competitors and the purpose clause of the *Act* as well as many provisions in the *Act* reflect this emphasis. Nevertheless, the legislative history of section 50(1)(a) as well as the purpose clause speak to the need to ensure, in the words of section 1.1, that competition be maintained in order to ensure "that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy." Under section 79, it would be up to the Tribunal to decide whether relief was appropriate given the effects on competition in general including any prejudice experienced by individual competitors in the context of particular cases. The Tribunal would have to discern the appropriate solution based on a weighing of the various elements of the purpose clause. The Interac case, in which there were numerous interventions before the Tribunal, is a good example of the use of the Tribunal to resolve complex issues where there are competing interests at stake.[277] Tribunal decisions would provide guidance for similar cases. Compared to the existing *per se* rules for price discrimination, it is more likely to provide better results in more cases and will minimize the competition and efficiency chilling effects associated with the current over inclusive *per se* rule.

Adequacy of Price Discrimination Enforcement Guidelines - In their current form, the *Price Discrimination Enforcement Guidelines* are useful, though the *Guidelines* cannot fully correct for the defects in the criminal price discrimination provision referred to above to create a provision consistent with the economic analysis in Part I. Some improvements may be made, however.

Work needs to be done to revise the *Guidelines* to render them more consistent with the *Competition Act*. The current approach to "availability" of price concessions requires that an offer of a price concession be made by a supplier in some circumstances. It is difficult to square such an interpretation with the statute. Also, the approach taken to the interpretation of sales needs to be reconsidered. The *Guidelines* create exemptions for enforcement purposes for transactions involving affiliates, franchise systems and international volume discounts which require an interpretation of sale that the is inconsistent with established jurisprudence. At least with respect to affiliates, this is not simply a technical issue. There may be good reasons for exempting sales between affiliated businesses; the terms of such sales may not mirror arm's length commercial relationships. In some such situations, however, discrimination in favour of affiliates may have anticompetitive effects.[278] A blanket exemption for enforcement purposes is hard to justify.

Although there is no technical impediment to applying section 79 to price discrimination, in order to ensure that price discrimination is routinely analyzed under the abuse provision, the *Guidelines* would have to be revamped to describe how this would be done in light of the issues raised in the preceding section and to ensure a break with any tendency to deal with price discrimination primarily through the criminal provision which we concluded may exist on the basis of the statistical profile in Part III.

Adequacy of Enforcement Activity - The statistical profile of enforcement activity shows that no formal enforcement actions were taken during the Review Period and few have ever been taken. Recent initiatives to deal with complaints through alternative case resolutions had only limited success in relation to price discrimination. Few price discrimination complaints were dealt with under the abuse of dominance provision.

Without assessing the relative value of the Bureau's many other activities, it is impossible to draw any definitive conclusion regarding this enforcement record. Nevertheless, one can say that the present criminal provision is sufficiently defective that, in pursuing its general mandate to protect competition, it is appropriate for the Bureau to adopt a very conservative enforcement approach in dealing with the relatively few complaints made regarding discriminatory pricing. With respect to taking cases under the abuse provision, there are a variety of questions which would arise with respect to how the Competition Tribunal would deal with a price discrimination case. It is not obvious that pursuing cases to resolve these questions would be a responsible use of the Bureau's constrained resources, except perhaps where price discrimination is one of a number of alleged anticompetitive acts or the anticompetitive effect is substantial. A more cost effective strategy would be to make better use of ACR's. Given the clear terms of the criminal provision, it is not clear why such a strategy could not be more successful.

Predatory Pricing

Adequacy of Provisions - Designing rules to deal effectively with predation is the thorniest problem related to anticompetitive pricing practices. The effects can be devastating but are extremely difficult to distinguish from the effects of aggressive competition, even with the expenditure of substantial resources. One thing seems clear, the existing criminal provision, suffers from some serious defects as an instrument to provide relief in circumstances where predation exists.[279]

The requirement for the alleged predator to be selling at prices which are unreasonably low in section 50(1)(c)[280] is very vague. The limited case law does not provide a complete methodology for determining when prices are unreasonably low. As discussed below, the *Predatory Pricing Enforcement Guidelines* respond to this concern, though there are various ways in which they may be improved as discussed below.

In the absence of such a framework, the section itself is very broad. Any intention to eliminate a competitor or the elimination of a competitor in fact, combined with low prices may be sufficient for liability. While efficiency concerns might argue in favour of a regime which prevented below cost pricing which had the effect of eliminating more efficient, vigorous or innovative competitors, the existing provision protects all competitors, regardless of the overall effect on competition or efficiency. To this extent, the provision is in conflict with the economic analysis of predation based on efficiency.

Dealing with predation under section 79 is one solution to these problems. As prescribed by economic analysis in Part I, section 79 imposes market power as a threshold for obtaining relief. The abuse provision offers the lower civil burden of proof which may be important given the inherently contestable nature of claims regarding predation.

As well, it requires an assessment of the effect on competition. The Tribunal would be able to consider not only whether there was a prospect of recoupment through supra-competitive pricing, but also the effects of predatory behaviour on the dynamic of competition in the market in which the predation took place. Such effects would include effect of the loss of particular competitors and their prospects for re-entry. The Tribunal could sort out the extent to which it was appropriate to take into account non-efficiency based considerations, such as the fairness of intentionally eliminating a competitor through low prices.

The abuse provision would also permit account to be taken of the particular conditions in the marketplace, including the factors discussed in relation to the new economy in Part I. Where a market was characterized by high levels of innovation, declining costs and network effects, low pricing which eliminated a competitor might nevertheless be found to be pro-competitive, where the pricing was part of a strategy to introduce a new and better technology and any dominance which resulted was unlikely to be sustained in the face of future innovation.

Nevertheless, section 79 does not provide a specific methodology for dealing with predation and the existing approach of the Tribunal to the critical concept of market power would have to be developed and adapted for use in predation cases. In particular, as suggested in the *Predatory Pricing Enforcement Guidelines*, there may be cases of predation where the predator has a market share below the rough 50 percent guide referred to by the Tribunal in its cases to date. As well, the nature of market power may well be different in predation situations as compared to other cases of abuse of dominance. Strategic behaviour on the part of the dominant firm would play a larger role.

One possible hurdle to obtaining relief from the Tribunal is its expressed unwillingness to directly interfere with pricing decisions by firms. It maybe reluctant to order a firm to cease specific pricing behaviour such as by setting a minimum price. Ordering a firm to simply stop predating would be virtually unenforceable. Some appropriate remedial approach would have to be developed before section 79 could be relied on as an effective way to deal with predation.

Adequacy of Predatory Pricing Enforcement Guidelines - The approach to enforcement taken in the Bureau's *Predatory Pricing Enforcement Guidelines* is generally consistent with the factors indicating predation identified in Part I. Nevertheless, they may set a standard which is tougher than is appropriate in practice.

There are several reasons for this concern. The two part test established in the *Guidelines* is a very high standard. The need to prove market power sufficient to permit recoupment to the criminal standard of proof, beyond a reasonable doubt, is very onerous, given the ultimately contestable nature of claims about market power. Obtaining good evidence of the alleged predator's costs will be extremely difficult in many circumstances, such as where the predator is extensively vertically integrated. In other circumstances, it will be impossible to obtain cost evidence without the exercise of formal search powers and the inability to demonstrate a credible prospect of recoupment may well make it impossible to take this step.

While reliance on intent evidence may relieve some of these problems, such evidence will not be available in some cases and in many others will be unreliable. In any case, the *Guidelines* suggest that intent will play a small role in the Bureau's assessment.

The *Predatory Pricing Enforcement Guidelines* do not provide guidance on the possible application of the newer theories regarding a wider array of situations in which predation may be present. They do not fully reflect this new learning regarding how strategic barriers to entry may be identified and measured and how non-price benefits associated with a predatory strategy should be taken into account. Also, the *Guidelines* do not address the challenges of the new economy specifically.[281]

While section 79 could be used to deal with predation cases, as indicated above, there are a range of questions which would need to be resolved with respect to its application and these could be usefully addressed in the *Guidelines*. The *Guidelines* do not, however, address how predation may be dealt with under section 79.

A final difficulty with the *Guidelines* is that the approach taken by the Bureau in the *Guidelines* has not been forthrightly adopted and applied by the courts. The *Guidelines* indicate that predatory intent, without the structural and dynamic market characteristics which would make recoupment likely and predation rational, is unlikely to be sufficient to found a case. Such an approach does not fully reflect the words of section 50(1)(c) which refer to eliminating a competitor and a design to substantially lessen competition or eliminate a competitor. The Bureau's approach recognizes the practical reality that direct evidence of intent is scarce and unreliable and that efficiency may not require the protection of particular competitors. Prosecuting cases based on intent alone also runs the risk of punishing unsuccessful predation which benefits the consumer, at least temporarily, in the form of lower prices. Nevertheless, possible inconsistencies between the *Guidelines* and the *Act* render the *Guidelines* less effective. This point is discussed in more detail below.

Adequacy of Enforcement - Prosecutions under the criminal predatory pricing provision have been rare and there has never been a successful application to the Tribunal in relation to predation, though predation was one of the allegations in *NutraSweet*. Again, without assessing the relative value of the Bureau's many other activities, it is impossible to draw any definitive conclusion regarding this enforcement record. Because the tests set out by the Bureau, in general, are consistent with economic analysis, some would argue that nothing needs to be done claiming that the absence of formal enforcement proceedings simply reflects the reality that predation is rare and recognizes that the risk of being wrong is that the Bureau's intervention will succeed only in forcing consumers to pay more. Given the number of complaints regarding predatory behaviour and the strong concerns raised by some independent business organizations interviewed for this study, this does not seem a complete response, particularly since as argued above, the Bureau's approach in the *Guidelines* is in need of improvement if it is to be an accurate tool for assessing allegations of predation.

As well, one may be concerned about the relatively low priority likely to be accorded to predation cases under the Bureau's case selection criteria which appear to disfavour predation cases in two main ways. First, the case selection criteria give weight to a narrower range of predatory behaviour than the *Guidelines* and the economic analysis in Part I would suggest may exist. Second, because ACR's seem to be rarely successful in predation cases and, consequently, there is no alternative to a contested case with the attendant commitments of time and expense, predation cases will rank poorly under the management considerations factor.

There are several factors arguing in favour of the Bureau seeking to initiate predation cases more aggressively. The lack of certainty regarding the law on predation is a significant concern. Formal enforcement proceedings would force the courts and the Tribunal to progressively refine the law, making clear its appropriate application, signal the seriousness of the Bureau's intent to enforce it and expose the weaknesses in the law which would, in turn, facilitate law reform. Increasing certainty brought about by greater formal enforcement activity by the Bureau would encourage greater interest in private actions under section 36. These issues are discussed in more detail below.

Price Maintenance

Adequacy of Existing Provisions - The present provisions dealing with price maintenance suffer from some of the same defects as those identified above in relation to price discrimination. The current provision is not designed to address only anticompetitive price maintenance based on the criteria suggested by economic analysis. Consequently, in its present form, it is not an accurate tool for taking enforcement action and likely imposes excessive compliance and monitoring costs on business. This chilling effect is exacerbated by the criminal nature of the offence of price maintenance.

With respect to all forms of vertical price maintenance, the economic analysis in Part I indicates that suppliers should be able to take advantage of efficiency based defenses, such as encouraging customers to devote more resources to the provision of customer service. Under section 61, where a supplier refuses to supply or otherwise discriminates against a customer because of the customer's low pricing policy, there are various defences which go some way to providing efficiency based defences. There is no obvious reason that these defences should be restricted to refusal to supply as opposed to all resale price maintenance activities. It may, nevertheless, be preferable to have more open ended categories given the impossibility of exhaustively listing all possible efficiency defenses.

The current provision treats as a criminal offence efforts by anyone to induce a supplier to refuse to supply a customer because of the customer's low pricing policy. Where the person making such efforts is a competitor of the customer, the motivation may often be anticompetitive. Nevertheless, the effect on competition will depend on the effort being successful, circumstances in the downstream market and the presence of an efficiency based justification for the supplier's action. So even here, an assessment of the effect on competition would appear to be warranted and the *per se* treatment of all attempts by competitors to induce refusal to supply is over-inclusive based on economic efficiency considerations.

The application of the existing abuse of dominance provision to price maintenance cases would require consideration of the market power of the person seeking to maintain prices and the effect on competition. Dealing with price maintenance under the abuse provision would be consistent also with the manner in which other vertical restraints are dealt with under the *Competition Act*. As noted in relation to price discrimination, it would require the Tribunal to consider the need to balance the interests of economic efficiency against the interest of businesses in being free from coercion by their suppliers on the facts of individual cases.

Relying on section 79 is not without challenges, however. Since section 79 is not specifically adapted to dealing with price maintenance cases, the development of some analytical framework for dealing with price maintenance cases, taking into account the efficiency based explanations discussed in Part I would be necessary. It is not obvious that the market power requirement should be the same in price maintenance cases as in the cases dealt with by the Tribunal so far. The issue of question of how to deal with the anticompetitive effects in downstream markets would also need to be addressed. As a consequence, in the interest of certainty, guidelines addressing these issues should be considered before section 79 is chosen as the preferred enforcement approach. A final disadvantage associated with dealing with price maintenance under section 79 is that it is substantially less certain than the current criminal provision. The impact that this may have on enforcement is discussed in the next section.

Horizontal price maintenance is unambiguously anticompetitive and it is appropriate to prohibit it on a *per se* basis as in the present provision, though consideration should be given to developing an enforcement policy and possibly guidelines to address the relationship between horizontal price maintenance and the conspiracy provision.

Adequacy of Enforcement - Formal enforcement actions used to be very common with respect to price maintenance; it represented one of the success stories for the Bureau. The enforcement profile in Part III shows that this has changed dramatically. Formal enforcement actions during the Review Period were rare. During the same time period, the use of ACR's as a substitute was remarkably successful.

Given the restricted focus of this study, an overall assessment of the Bureau's enforcement record cannot be made. There is no compelling need to engage in formal enforcement proceedings as an alternative to ACR's since the criminal provision is very clear and the subject of substantial case law. Consequently, the Bureau's emphasis on ACR's would seem to be appropriate.

Inevitably, dealing with price maintenance under section 79, imposing a market power requirement and permitting efficiency defenses, would make it much more difficult to deal with price maintenance using the ACR approach. The requirement to gather sufficient information to make an accurate assessment alone will greatly extend the period of time before ACR discussions can begin in many cases. Also, again in many cases, the existence of market power and efficiencies will be contestable conclusions in contrast to the relative certainty of proving that the very specific requirements in the current section 61 are met. From the perspective of compliance, resort to section 79 would be far less predictable. The reduction in predictability will be somewhat offset for market participants who are not dominant, since the section has no application in such circumstances.

It may be as well that dealing with price maintenance under section 79 would reduce the ability of the Bureau to negotiate ACR's, because it will remove the stigma of a possible criminal conviction reducing the Bureau's negotiating leverage. This may be offset somewhat, because it will be easier to approach an alleged perpetrator where only civil sanctions may be threatened.

In any case, the economic analysis in Part I suggests that addressing price maintenance under section 79 should yield more accurate enforcement activity than the *per se* approach in section 61. Consequently, a cautious approach to enforcement of section 61 is appropriate, focusing on price maintenance where there is a clear anticompetitive effect. The Bureau's case selection criteria reflect this focus.

General Comments

Responding to the Challenge of the New Economy

In the new economy, competition will continue to increase in intensity and the pace of technological change will continue to accelerate. In industries most affected by these trends the challenge of accurately identifying and taking enforcement action against anticompetitive pricing behaviour will be daunting. The Bureau needs to ensure that its enforcement of the *Competition Act* reflects an appreciation of how these industries operate.

One way of doing so would be to work toward developing greater industry specific expertise as discussed below. Another would be to ensure that emphasis is placed on taking into account the dynamic operation of markets over time rather than short term effects. Such an approach will affect conclusions regarding the changes to the nature and durability of dominance in some sectors.

One characteristic of innovation driven markets is that the innovator will be dominant, at least for a time, where, for example, the innovator succeeds in establishing its product as a standard. The establishment of a standard may be beneficial to consumers. A second characteristic of such markets, however, is that the market power needed to successfully engage in many types of anticompetitive pricing practices will be elusive because such markets are characterized by declining barriers to entry and persistent threats to dominance from new products and technology. Any standard will not be sustainable in the long term since standards themselves are a significant site of competition. This has direct implications for the manner in which market power assessments are conducted under the abuse of dominance provision and under the *Predatory Pricing Enforcement Guidelines*.

The competition policy analysis currently conducted by the Bureau recognizes dynamic efficiency considerations in many situations. The structure of section 79 permits dynamic efficiency considerations to be taken into account. As well, the framework developed for interpreting the predatory pricing provision in the *Predatory Pricing Enforcement Guidelines*, is based on dynamic efficiency. With respect to neither provision, however, has the Bureau spelled out how it will address dynamic efficiency in the specific context of the industries of the new economy. More importantly, the current *per se* criminal provisions dealing with price discrimination and price maintenance, on their face, provide little scope for a dynamic efficiency analysis. Accordingly, one may be concerned that these provisions are not well adapted to be responsive to the changes currently transforming the Canadian economy.

Marshalling Industry Specific Expertise

Through experience particular Bureau officers have gained an in depth understanding of particular industries but greater efforts need to be made to capitalize on this accumulated wisdom and to develop it. Recently, the Civil Branch arranged to obtain information on a regular basis from the Mergers Branch related to the waste industry. This sort of information exchange as well as applying expertise held by particular individuals in different branches should be encouraged and supported.

The importance of improving industry specific expertise stems from a range of factors disclosed in this study. The Bureau's basic role as an investigative agency is to respond to complaints. This encourages an intensive examination of the current situation subject of the complaint but may discourage consideration of longer term trends.[282] Yet it is precisely such trends that may be most relevant to assessing the likely competitive impact of a particular behaviour. Sensitivity to dynamic changes in industries is both more difficult and more important given the current radical transformation taking place in some industries as the Canadian marketplace responds to the challenges of the new economy. Pricing strategies are becoming more sophisticated and the environment for many businesses is evolving quickly in response to accelerated technological change and network effects.

More effective marshalling of industry specific expertise at the Competition Bureau is critical to ensuring that Bureau officers are equipped to make accurate judgements on the high volume of complaints they deal with. As the statistical profile in Part III shows, most pricing cases are resolved, in one way or another, before complaints become projects based on an officer's preliminary assessment. As a consequence, it is at this stage that the impact of competition law will be experienced by many market place participants and so priority must be attached to maximizing the likelihood of an accurate assessment at this stage. Enhanced industry specific expertise may also permit complaints to be processed in a more timely and cost effective manner.

The need for industry specific expertise is most pressing in relation to predation cases where the assessment of market dynamics is most complex, in part, because of the need to take into account strategic behaviour by the alleged predator, such as behaviour related to its reputation. As well, not only must the Bureau take into account the dynamics of the market in which the predation is alleged, but also other markets in which the alleged predator is active. An appreciation for what has happened and what is likely to happen in an industry makes assessments about the credibility of predation simpler and more likely to be accurate. In some cases in which it was determined not to proceed, for example, it may be useful to monitor the market in which the predation was alleged to have been occurring. Gathering this type of information would permit better understanding of the competitive process in a particular industry and the possible application of some of the newer theoretical rationales for predatory strategies.

Enhancing industry specific expertise does not mean that a case should be considered on anything other than its own merits. Rather, it would allow more accurate assessments of what is going on in a particular situation based on past experience and a sophisticated appreciation of current and likely future developments. The challenge is to create effective strategies to better develop and lever such expertise.[283]

The Limitations of Guidelines

Through its *Price Discrimination Enforcement Guidelines* and *Predatory Pricing Enforcement Guidelines* the Bureau has attempted to provide, for enforcement purposes, a coherent rationale for enforcing the criminal provisions dealing with price discrimination and predatory pricing. Despite some of the criticisms made above, for the most part, this has been a very effective approach to enforcement.

Guidelines are significantly more cost effective than litigation for the purposes of clarifying interpretive uncertainty relating to the provisions of the *Competition Act*. As well, they can deal with issues comprehensively and within an analytical framework, while decisions in individual cases contribute only incrementally to the understanding of the law and the analysis may be tied to the facts of each case. Guidelines increase the likelihood of consistent and accurate decision making by commerce officers who make the difficult assessments of cases at the critical preliminary assessment stage. By disclosing a clear approach to enforcement, guidelines may facilitate ACR's and, more generally, will ease the compliance burden for business.

Nevertheless, guidelines have limits. Guidelines have no binding effect on the Bureau and provide no defence to private enforcement. They are not capable of correcting basic defects in the law. To the extent that the enforcement policy disclosed in the guidelines is at variance with the provisions themselves, the guidelines are less reliable. As well, there is a risk that a gap will be created between the expectations about enforcement based on the provisions of the *Act* and enforcement activity based on the guidelines.

We have found that there are several ways in which the *Price Discrimination Enforcement Guidelines* and *Predatory Pricing Enforcement Guidelines* adopt interpretations which stretch the provisions of the *Act*. In the case of *Predatory Pricing Enforcement Guidelines*, the elaborate two step test for predation has not been fully endorsed in the limited case law. As well, the *Guidelines* downplay of the role of intent and the significance of eliminating competitors both of which are referred to in the criminal predatory pricing provision. The *Price Discrimination Enforcement Guidelines* adopt interpretations regarding when terms are available to competitors and when a sale occurs which have been criticized as inconsistent with the statute. When one examines the case selection criteria, one finds additional criteria not specified in the *Act*.

In order for guidelines and other voluntary compliance strategies to be successful, they must be accompanied by formal enforcement activity. Such activity is needed both to show that formal enforcement is a credible threat and to clarify the law, whether by confirming the Bureau's interpretation or by discrediting it. By showing the defects in the law, formal enforcement encourages law reform.

Formal enforcement may be useful in relation to pricing practices. There are significant differences between what economic theory would prescribe and the criminal provisions dealing with anticompetitive pricing. In part, this is because the pricing provisions were designed to protect certain categories of competitors from activities of other competitors perceived to be unfair, rather than the promotion of overall economic efficiency. These conflicts between the protection of competitors and the promotion of efficiency should be resolved in the courts, before the Tribunal or though legislative reform.

Admittedly, the litigation alternative is not a very efficient way of protecting competition,[284] exposing problems with the law or clarifying its operation. It is essential to acknowledge that increased litigation would impose enormous resource demands on the Bureau. The resource implications of increased formal enforcement activity would have to be addressed. One possible solution may be to permit private access to the Tribunal as recommended recently by Roach and Trebilcock.[285]

Improved Communications Strategy

The Bureau needs to find a more effective communications strategy to make the *Act* and the role and practice of the Bureau better understood by the business community and the public.[286] In particular, the independent business community seems to feel that the Bureau is not enforcing the *Act* in a manner which lives up to the promise of the purpose clause and the language of the pricing provisions. While the work of the Bureau has become significantly more transparent in the past few years, interviews conducted for this study revealed that substantial work remains to be done. Promoting better understanding of its interpretation and analysis would encourage compliance, enhance the legitimacy of the Bureau's activities and provide a basis for informed public discussion of the extent to which Canada's competition law dealing with anticompetitive pricing are adequate.

Recommendations

Price Discrimination

1. **In order to target anticompetitive conduct accurately, competition rules dealing with price discrimination**
    - **(a) should apply to**
        - **(i) all products, including articles and services,**
        - **(ii) all forms of transactions, not just sales,**
    - **(b) should not apply to**
        - **(i) differential pricing by a supplier justified by differences in the cost to the supplier of serving different customers,**
        - **(ii) price differences which are a temporary expedient or a defensive competitive response,**
    - **(c) should take into account**
        - **(i) the market power of the supplier, including the availability of alternative sources of supply, and**
        - **(ii) the competitive effects of the price discrimination.**

2. **Price discrimination should not be a criminal offence but should be subject to civil review.**

3. **Civil review could be accomplished under the abuse of dominance provision, section 79, in a manner consistent with recommendation 1, but revision of the criminal price discrimination provision, section 50(1)(a), should be considered in the next round of amendments to the *Competition Act*.**

4. The *Price Discrimination Enforcement Guidelines* should be revised to

(a) provide guidance regarding the application of the abuse of dominance provision, section 79, to price discrimination, including an analytical framework for the assessment of market power and competitive effect under section 79,

(b) modify the analysis of the circumstances in which price concessions are considered to be available to competing customers in a manner more consistent with the *Act* by revising the requirement that any concession unilaterally offered to one customer be offered to all others and

(c) modify the analysis of transactions between affiliates, sales to franchise systems and international volume discounts to more accurately reflect the commercial law definition of sales.

Predatory Pricing

5. In order to target anticompetitive conduct accurately, competition rules dealing with predatory pricing should take into account

(a) the market power of the alleged predator including the prospect for the predator to recoup the costs of its low pricing policy,

(b) the degree to which the predator is selling below its costs and

(c) evidence of predatory intent.

6. Predatory pricing should not be a criminal offence but should be subject to civil review.

7. Civil review could be accomplished under the abuse of dominance provision, section 79, in a manner consistent with recommendation 5, but revision of the criminal predatory pricing provision, section 50(1)(c), should be considered in the next round of amendments to the *Competition Act*.

8. The *Predatory Pricing Enforcement Guidelines* should be revised to

(a) provide guidance regarding the application of the abuse of dominance provision, section 79, to predatory pricing, including an analytical framework for the assessment of market power and competitive effect under section 79,

(b) expand the discussion of how firms may create strategic barriers to entry by their

behaviour, such as by creating a reputation for predation, to reflect current economic thinking regarding the broader range of circumstances in which predation may occur and

(c) provide guidance on the application of the *Guidelines* to industries most affected by the accelerating pace of innovation and the other characteristics of the new economy.

9. The Bureau should consider adopting a more aggressive approach to initiating formal enforcement actions in predation cases, taking due account of budgetary implications and competing priorities.

Price Maintenance

10. In order to target anticompetitive conduct accurately, competition rules dealing with vertical price maintenance should take into account

(a) the market power of the supplier, including the availability of alternative sources of supply, and

(b) the competitive effects of the price maintenance, including any efficiency based explanations.

11. Vertical price maintenance should not be a criminal offence but should be subject to civil review.

12. Civil review could be accomplished under the abuse of dominance provision, section 79, in a manner consistent with recommendation 10, but revision of the criminal price maintenance provision, section 61, should be considered in the next round of amendments to the *Competition Act*.

13. Consideration should be given to the development of guidelines regarding the application of section 79 to price maintenance cases, including an analytical framework for the assessment of market power and competitive effect under section 79.

14. Consideration should be given to developing guidelines to address the relationship between the current criminal provision, section 61, as it applies to horizontal price maintenance, and section 45, dealing with conspiracies and agreements to lessen competition.

General Recommendations

15. The apparent conflicts between the promotion of efficiency and the protection of competitors which exist in some circumstances under the existing criminal provisions dealing with price discrimination, predatory pricing and price maintenance should be resolved by the courts, the Competition Tribunal or through legislative reform.

16. The Bureau should ensure that its guidelines, policies and practices regarding enforcement give appropriate emphasis to dynamic efficiency considerations and the characteristics of the new economy including (i) high rates of innovation, (ii) marginal costs declining or zero for additional units of output, (iii) the possible desirability of market dominance by a firm where it sets a new industry standard and (iv) the increasingly fragility of dominance.

17. The Bureau should increase its efforts to develop industry specific expertise in order to ensure that officers are equipped to make accurate assessments in a timely manner.

18. The Bureau should develop a more effective communications strategy to promote better understanding of the *Competition Act* provisions and the activities of the Bureau regarding anticompetitive pricing, with a view to encouraging compliance, enhancing the legitimacy of the Bureau's activities and providing an informed basis for public discussion.

ENDNOTES

1. Marketing practices are by far the most frequently complained about anti-competitive activity.

2. Detailed statistics are provided in Part IV.

3. Bill C-235 passed first reading on October 6, 1997 and was referred to the Standing Committee on Industry. On April 15, 1999, the Committee decided to report the Bill to the House of Commons without the clauses or the title. The Bill is numbered C-201 in the second session of the 36th Parliament.

4. R.S.C. 1985, c. C-34, as amended by R.S.C. 1985, c. 27 (1st Supp.); R.S.C. 1985 c. 19 (2nd Supp.); R.S.C. 1985, c. 34 (3rd Supp.); R.S.C. 1985, c. 1 (4th Supp.); R.S.C. 1985, c. 10 (4th Supp.); S.C. 1990, c. 37; S.C. 1991, cc. 45, 46, 47; S.C. 1992, cc. 1, 14; S.C. 1993, c. 34; S.C. 1995, c. 1; S.C. 1999, c. 2 . This had been previously held in the case law (*e.g.* ***Weidman*** v. *Schragge* (1912), 46 S.C.R. 1 at 4).

5. This view was recently expressed by the Commissioner of Competition, Konrad von Finckenstein, in his remarks to the Industry Committee on Bill C-235 (Standing Committee on Industry, April 15, 1999).

6. Tradeoffs may also be required, for example, between static efficiency and dynamic efficiency, low prices and richness of choices and present versus future terms of sales for consumers.

7. J.B. Dunlop, D. McQueen & M. Trebilcock, COMPETITION POLICY: A LEGAL AND ECONOMIC ANALYSIS (Toronto: Canada Law Book, 1987) at 208.

8. Any attempt to provide a general analysis of anticompetitive pricing practices must start by stating clearly that there are two broad traditions of analysis in good currency (S. Martin, ADVANCED INDUSTRIAL ECONOMICS (Oxford: Blackwell, 1993)). The first one may be characterized as mainstream industrial economics generally associated with the structure-conduct-performance framework as it has evolved and has been enriched over the last fifty years. This is an intellectual tradition that has focussed on practices and markets that cannot easily be analysed by the standard textbook competitive model, and on the design of policies to provide timely correctives to such situations when they are socially costly. The second tradition may be characterized as based on the hypothesis that the model of competitive markets is sufficient to explain real-world phenomena.

These two traditions share most definitions and analytical tools, so one does not have to make an ideological decision *ex ante*. Our approach will therefore remain agnostic. Some have argued that empirical analyses might be able to discriminate between these two cosmologies. This is not the case.

The sort of analyses that social scientists are capable of generating are at best based on "weak" causal reasoning. Despite the attractiveness of "strong" causal thinking as displayed by the scientific approach, one must usually be satisfied with "weak" theories. Empirical evidence remains very difficult to interpret, and it would be unwise not to be aware of this flaw when making policies.

9. Discrimination can also occur where the same price is charged to customers who, perhaps because one is more expensive to serve than the other, should be charged different prices.

10. D.W. Carlton & J. Perloff, MODERN INDUSTRIAL ORGANIZATION (New York: HarperCollins, 1990); D.F. Greer, INDUSTRIAL ORGANIZATION AND PUBLIC POLICY (New York: MacMillan, 1980).

11. D.F. Greer, INDUSTRIAL ORGANIZATION AND PUBLIC POLICY (New York: MacMillan, 1980).

12. F. G. Tiffany & J. A. Ankrom, "The competitive use of price discrimination by colleges" (1998) 24 Eastern Econ. J. 99.

13. R. Wilson, NON-LINEAR PRICING (New York: Oxford, 1993) at 30-36.

14. D. I. Rosenbaum & M.-H. Ye, "Price Discrimination and Economics Journals" (1997) 29 Applied Econ. 1611. Dana developed a model demonstrating price discrimination in the airline industry through the use of advance-purchase discounts (J.D. Dana, Jr., "Advance-purchase discounts and price discrimination in competitive markets" (1998) 106 J. of Political Econ. 395).

15. This comment was made by McFetridge (D.G. McFetridge, "Predatory and Discriminatory Pricing" in THE LAW AND ECONOMICS OF COMPETITION POLICY, F. Mathewson, M. Trebilcock & M. Walker, eds. (Vancouver: Fraser Institute, 1990) at 74).

16. J. Slive & D. Bernhardt, "Pirated for Profit" (1998) 31 Can. J. of Econ. 886.

17. This would occur where consumers have low demand elasticity (W.K. Viscusi, J.M. Vernon & J.E. Harrington, ECONOMICS OF REGULATION AND ANTITRUST (Cambridge: MIT Press, 1995). This definition of price discrimination in a static context is the one in good currency. It presumes that product variety is more or less fixed, that there is no technical change and that there is no entry of new firms. This is hardly realistic. In a world characterized by constant technical change, constant product innovation, and evolving consumer requirements, the assumption that one is faced with "the same product" is hardly realistic. But there are serious consequences when one exits this simplistic world. What might be reasonably regarded as price discrimination in a static context might correspond to an acceptable pricing strategy in a Schumpeterian "creative destruction" world where competition is importantly focussed on gaining market share in the early phase of the product cycle in order to impose a standard (R. Brenner, "Market Power: Innovations and Antitrust" in THE LAW AND ECONOMICS OF COMPETITION POLICY, F. Mathewson, M. Trebilcock and M. Walker, eds. (Vancouver: Fraser

Institute, 1990)). We will return to this later.

18. If one views discrimination from a more dynamic perspective, it would be necessary to consider to what extent the surplus transferred to the discriminator would be invested to create future efficiencies in its business. If sufficient competition appeared in the market, the benefit of such efficiencies might ultimately be passed on to consumers. A dominant discriminator is less likely to be able to maintain its dominance in markets characterized by high levels of innovation.

19. J.B. Dunlop, D. McQueen & M. Trebilcock, COMPETITION POLICY: A LEGAL AND ECONOMIC ANALYSIS (Toronto: Canada Law Book, 1987) at 217.

20. *Ibid.* at 217-8.

21. Dunlop, McQueen and Trebilcock also suggest that suppliers have good reasons to resist efforts by customers to obtain large non-cost justified discounts. To the extent that discriminatory discounts in favour of a large customer threaten the existence of some of supplier's other customers and results in increased market power for the large customer, it is not in the supplier's interest to cave in to such pressure. Granting such discounts may lead to the large customer having a monopsony (*ibid.*).

22. Market power may be evidenced by lower output than would be expected in a competitive market. This has been shown to be the case regardless of the number of sub-markets, the behaviour of marginal cost (increasing, constant or decreasing), and any interdependence in demand between sub-markets (R. Schmalensee, "Output and welfare implications of monopolistic third-degree price discrimination" (1981) 71 American Econ. Rev. 242; H.R. Varian, "Price discrimination and social welfare" (1985) 75 American
Econ. Rev. 870; and M. Schwartz, "Third-degree price discrimination and output: generalizing a welfare result" (1990) 80 American Econ. Rev. 1259).

23. P. Milgrom & J. Roberts, "Limit Pricing and Entry under Incomplete Information" (1982) 27 Econometrica 280).

24. D.G. McFetridge, "Predatory and Discriminatory Pricing" in THE LAW AND ECONOMICS OF COMPETITION POLICY, F. Mathewson, M. Trebilcock & M. Walker, eds. (Vancouver: Fraser Institute, 1990) at 75-78.

25. A buy out at any time would be subject to review under the merger provisions of the *Competition Act* (ss. 91-103).

26. P. Bolton & D.Scharfstein, "A Theory of Predation Based on Agency Problems in Financial Contracting" (1990) 61 American Econ. Rev. 93.

27. J. Ordover & G. Saloner "Predation, Monopolization and Antitrust" in HANDBOOK OF INDUSTRIAL ORGANIZATION, R. Schmalensee and R. Willig, eds. (New York: Esevier Science,1989)

at 562.

28. P. Milgrom & J. Roberts, "Limit Pricing and Entry under Incomplete Information" (1982) 27 Econometrica 280; J. Roberts, "A Signaling Model of Predatory Pricing" (1986) 28 Oxford Economic Papers 75; G. Saloner, "Predation, Mergers and Incomplete Information" (1987) 18 Rand J. of Econ. 165.

29. E. Rasmussen, "Signal Jamming and Limit Pricing: A Unified Approach" Yale Law School Working Paper, 1991.

30. P. Milgrom & J. Roberts, "Limit Pricing and Entry under Incomplete Information" (1982) 27 Econometrica 280.

31. J. R. Lott, ARE PREDATORY COMMITMENTS CREDIBLE? WHO SHOULD THE COURTS BELIEVE (Chicago, University of Chicago Press, 1999) at 28-59.

32. D.G. McFetridge, "Predatory and Discriminatory Pricing" in THE LAW AND ECONOMICS OF COMPETITION POLICY, F. Mathewson, M. Trebilcock & M. Walker, eds. (Vancouver: Fraser Institute, 1990) at 83.

33. P. Areeda & D. Turner, "Predatory Pricing and Related Practices under Section 2 of the Sherman Act" (1975) 88 Harvard L. Rev. 697.

34. Areeda and Turner suggest average variable cost as a proxy only so long as the predator has excess capacity. If the predator is producing at capacity, they suggest average total cost is a better proxy because of the need to add new plant to produce more. This distinction was recognized in *Director of Investigation and Research* v. *NutraSweet* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.) as discussed in Part II.

35. P. Joskow & A. Klevorick, "A Framework for Analysing Predatory Pricing Policy" (1979) 89 Yale L. J. 213. McFetridge is critical of this model as being unworkable in practice (D.G. McFetridge, "Predatory and Discriminatory Pricing" in THE LAW AND ECONOMICS OF COMPETITION POLICY, F. Mathewson, M. Trebilcock & M. Walker, eds. (Vancouver: Fraser Institute, 1990) at 93-4).

36. D.G. McFetridge, "Predatory and Discriminatory Pricing" in THE LAW AND ECONOMICS OF COMPETITION POLICY, F. Mathewson, M. Trebilcock & M. Walker, eds. (Vancouver: Fraser Institute, 1990) at 83.

37. O. Williamson, "Predatory Pricing: A Strategic and Welfare Analysis" (1977) 87 Yale L. J. 284.

38. *E.g.* R. A. Posner, ANTITRUST LAW (Chicago: University of Chicago Press, 1976). Intention has the advantage of allowing action to be taken against people engaged in anti-competitive acts for

non-economic reasons, or who do so out of bad judgement. This benefit will be largely mitigated in practice since unsuccessful predation, in general, is good for consumers.

39. Miller and Pautler (1985). J. R. Lott, ARE PREDATORY COMMITMENTS CREDIBLE? WHO SHOULD THE COURTS BELIEVE (Chicago: University of Chicago Press, 1999) at 7; R. A. Posner, ANTITRUST LAW, *ibid.* at 189-190. L. A. W. Hunter and S. M. Hutton state "... it is impossible to distinguish between predatory and non-predatory competitive intent" in "Is the Price Right? Comments on the *Predatory Pricing Enforcement Guidelines* and *Price Discrimination Enforcement Guidelines* of the Bureau of Competition Policy" (1993) 38 McGill L. J. 830 at 864.

40. M. A. Utton, "Anticompetitive Practices and the Competition Act, 1980" University of Reading, Department of Economics Discussion Papers in Industrial Economics, Series E Vol. III (1990/1) No. 24. A 1998 study of competition in the U.K. petrol market conducted for the Office of Fair Trading found no evidence of predatory activity, though large numbers of independent gas stations had closed. Office of Fair Trading, *Competition in the Supply of Petrol in the UK* (1998). The OFT attributed the decline in independents to intense competition from supermarkets.

41. As discussed in Part II and Part III, all of these factors are present in the current Canadian regime.

42. R. Koller, "The Myth of Predatory Pricing" (1971) 4 Antitrust Law and Economics Review 105. *See also* J. McGee, "Predatory Price Cutting: The Standard Oil (N.J.) Case" (1958) 1 J. of L. and Econ. 137; K. Elzinga, "Predatory Pricing: The Case of the Gunpowder Trust" (1970) 13 J. of L. and Econ. 223; L. Phlips & I. M. Moras, "The AKZO decision: a case of predatory pricing?" (1991) 41 J. of Industrial Econ. 315.

43. M.R. Burns, "Predatory Pricing and the Acquisition Cost of Creditors" (1986) J. of Pol. Econ. 266; D Weiman & R. Levin, "Preying for Monopoly: the Case of the Southern Bell Telephone Company 1894-1912" (1994) J. of Pol. Econ. 103.

44. T.Calvani, "Predatory Pricing and below-cost sales statutes in the United States: an analysis (Ottawa: Competition Bureau, 1999) at 2-4.

45. F. Mathewson & R. Winter, "The Law and Economics of Vertical Restraints" in THE LAW AND ECONOMICS OF COMPETITION POLICY, F. Mathewson, M. Trebilcock & M. Walker, eds. (Vancouver: Fraser Institute, 1990) at 112.

46. Price maintenance may not protect a competitor where the competitor sells multiple goods only some of which are subject to price maintenance or there are many substitutes available for the price maintained goods in the market.

47. One may expect that this would be rarely successful where a reseller may find an alternative source of supply. In practice, however, the costs of changing suppliers, and exclusive contracting

arrangements may make doing so infeasible. One Commerce Officer interviewed suggested that the majority of price maintenance cases dealt with by the Bureau involved competitor induced price maintenance.

48. There may also be non-economic arguments in favour or permitting resale price maintenance. The protection of inefficient retailers resulting from price maintenance can be justified on political or distributional grounds. The protection of less efficient retailers which service special interests (*e.g.* seniors, disabled, lower income, etc.) and the protection of small business may warrant the reduction in competition resulting from price maintenance.

49. A. W. Dnes, "Resale price maintenance and antitrust policy" (1996) 3 Applied Economics Letters 107 at 107-108. The magnitude of this effect will be a function of the search costs of consumers and the inherent importance of service in connection with a particular product. Where search costs are low and the product is complex, such as computers, the free riding problem is likely to be significant. F. Mathewson & R. Winter, "The Law and Economics of Vertical Restraints" in THE LAW AND ECONOMICS OF COMPETITION POLICY, F. Mathewson, M. Trebilcock & M. Walker, eds. (Vancouver: Fraser Institute, 1990) at 120.

50. F. Mathewson & R. Winter, *ibid.* at 121-2.

51. H.P. Marvel & S. McCafferty, "The welfare effects of resale price maintenance" (1985) 28 J. of L. & Econ. 363.

52. R. Deneckere, H. Marvel & J. Peck, "Demand uncertainty and price maintenance: markdowns as destructive competition" (1997) 87 American Econ. Rev. 619.

53. R. M. Ippolito, "Resale Price Maintenance: Empirical Evidence from Litigation" (1991) 34 J. Law and Econ. 263.

54. H.P. Marvel & S. McCafferty, "The welfare effects of resale price maintenance" (1985) 28 J. of L. & Econ. 363.

55. R. M. Ippolito, "Resale Price Maintenance: Empirical Evidence from Litigation (1991) 34 J. Law and Econ. 263.

56. This includes adopting a consultative coordination capability within the production chain, and a cooperation strategy with other stakeholders and governments (*see* J. de la Mothe & G. Paquet, eds., CHALLENGES UNMET IN THE NEW PRODUCTION OF KNOWLEDGE (Ottawa: PRIME, 1998).

57. Typically referred to as "Schumpeterian efficiency" (G. Paquet, "Evolutionary cognitive economics" (1998) 10 Information Econ. and Policy 343).

58. Corley suggests that competition policy traditionally focused on static market analysis. Where dynamic changes were considered, "traditional analysis primarily focused on non-transitory changes that resulted in a shift in equilibrium rather than the continuous change which characterizes the Information Economy." R.D. Corley, " IP and Competition Law: Enforcement Challenges of the Information Economy" Canadian Bar Association, Annual Fall Conference on Competition Law (1999) at 11.

59. G. Dosi *et al.*, TECHNICAL CHANGE AND ECONOMIC THEORY (Great Britain: Pinter, 1988).

60. *See* W. O. Sheramata, "New issues in competition policy raised by information technology industries;" J. Farrell, "The effects of antitrust and intellectual property law on compatibility and innovation;" and D. J. Teece, "The meaning of monopoly: antitrust analysis in high-technology industries" in (1998) 43 Antitrust Bulletin (various pages). In the same volume, Rubinfeld suggests how conventional antitrust analysis can be applied to deal with dynamic network industries (D. L. Rubinfeld, "Antitrust enforcement in dynamic network industries" (1998) 43 Antitrust Bulletin).

61. Antitrust Division, Department of Justice, *Antitrust Guidelines for the Licensing and Acquisition of Intellectual Property* (Washington: U.S. Department of Justice, 1995).

62. J.M. Nannes, "Antitrust in an era of high-tech innovation" Address by John M. Nannes, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice to the National Institute Representing High Technology Companies (Boston MA., 1998).

63. W. J. Baer, "Antitrust enforcement and high technology markets," Address by W. J. Baer, Director of the Bureau of Competition of the Federal Trade Commission, to American Bar Association (San Francisco, 1998).

64. H. I. Wetston, "The Treatment of Co-operative R&D Activities under the *Competition Act*" (Consumer and Corporate Affairs Canada, March 4, 1988); R. Brenner, "Market Power: Innovations and Antitrust" in THE LAW AND ECONOMICS OF COMPETITION POLICY, F. Mathewson, M. Trebilcock & M. Walker, eds. (Vancouver: Fraser Institute, 1990) at 127.

65. C. S. Goldman & J. D. Bodrug, "Antitrust Law and Innovation - Limits on Joint Research & Development and Inter-Company Communications in Canada" (1995) Canada-United States L.J. 127.

66. Ottawa: Supply and Services Canada, 1995.

67. *I.e.*, the supply curve is downward sloping.

68. J.T. Schwartz, "America's economic-technological agenda for the1990s" (1992) 121 Daedalus 139; K. Kelly, NEW RULES FOR THE NEW ECONOMY: 10 RADICAL STRATEGIES FOR A CONNECTED WORLD (New York: Penguin, 1998).

69. G. B. Richardson, "Competition, innovation and increasing returns" (1996) Danish Research Unit for Industrial Dynamics Working Paper No 96-10; G. B. Richardson, "Economic analysis, public policy and the software industry" (1997) Danish Research Unit for Industrial Dynamics Working Paper No. 97-4.

70. G. B. Richardson (1996), *ibid.*, G. B. Richardson (1997), *ibid.*; L. Soete & B. ter Weel, "Schumpeter and the knowledge-based economy: on technology and competition policy" Maastricht Economic Research Institute on Innovation and Technology Research Memoranda 99-04 (1999).

71. G.B. Richardson, *ibid. See also See* G. Dosi, "The nature of the innovative process" in G. Dosi *et al.*, TECHNICAL CHANGE AND ECONOMIC THEORY (Great Britain: Pinter, 1988) at 221.

72. R.D. Corley, " IP and Competition Law: Enforcement Challenges of the Information Economy" Canadian Bar Association, Annual Fall Conference on Competition Law (1999) at 21.

73. W. Holmes, ANTITRUST HANDBOOK (New York: Boardman & Co.,1998) at 266-268. Holmes suggests that some argue in favour of the inclusion of non-competition factors such as the effect on employment and other social interests, but concludes that there is no consensus on the requirement to do so.

74. Each approach has its advocates: Ordover and Saloner, after summarizing the debate conclude "simpler, more explicit tests of anticompetitive behaviour are likely to be preferable , even if, in some circumstances, these tests would produce [systematic over and under inclusion]"(J. A. Ordover & G. Saloner, "Predation, Monopolization and Antitrust" in R. Schmalensee and R. Willig, eds., HANDBOOK OF INDUSTRIAL ORGANIZATION (New York: Elsevier Science, 1989) at 580); J. Church and R. Ware "Abuse of Dominance under the 1986 Canadian Competition Act" (1998) 13 Rev. of Indust. Org. 85-129 prefer a full rule of reason approach and conclude that the abuse of dominance provision in the *Competition Act* has been "conducive to implementation of social welfare criterion using a rule of reason approach" (at 86).

75. *Sylvania Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977).

76. *General Motors of Canada* v. *City National Leasing*, [1989] 1 S.C.R. 641.

77. Such considerations are briefly referred to in the Bureau's *Merger Enforcement Guidelines*, Information Bulletin No. 5 (Consumer and Corporate Affairs Canada, 1991) at 3.2.2.1, 3.3.2.1 and Appendix I(III).

78. For the full text of all the provisions of the *Competition Act* referred to see Appendix 2.

79. Section 489A of the *Criminal Code*, enacted by S.C. 1935, c. 56, s. 9, and re-enacted by S.C. 1952, c. 39, s. 11. In the next revision of the *Criminal Code*, the provision became s. 412 (S.C. 1953-4, c. 51) and it was transferred to the *Combines Investigation Act* as s. 33A by S.C. 1960, c.

45, s. 13).

80. *Report of the Royal Commission on Price Spreads* (Ottawa: King's Printer, 1935), Chapter 2.

81. In the United States such an injury was found in *United States* v. *New York Great Atlantic & Pacific Tea Co. Inc. et al.*, 67 F. Supp. 626 (Ill. Dist. Ct., 1946) aff'd 173 F. 2d 79 (7th Cir., 1949).

82. *Report of the Royal Commission on Price Spreads* (Ottawa: King's Printer, 1935) at 270. R. J. Roberts, ROBERTS ON COMPETITION/ANTITRUST: CANADA AND THE UNITED STATES, 2d ed. (Toronto: Butterworths, 1992) at 135.

83. In 1960, a prohibition on granting allowances for advertising or display purposes that are not offered on proportionate terms to competing purchasers was added to the law because it was believed that the price discrimination provision did not catch such discrimination since it did not take the form of a price concession.

84. In 1977, s. 50(1)(c), the predatory pricing provision, and s. 50(1)(b), the regional price discrimination provision was amended to apply to "products", which includes both goods and services (S.C. 1977-75-76, c. 76, s. 16). The general price discrimination provision, s. 50(1)(a), was not amended. Note also that the offence may be committed by persons who are party or privy to or assist in any sale, so liability could attach to an agent or broker acting on behalf of a seller. Buyers are not liable, though the *Price Discrimination Enforcement Guidelines* suggest that a buyer could be held liable for counseling an offence (at 8). Also, if the buyer has market power, other sections may apply. Consignment sales entered into for the purpose of discriminating are prohibited under s. 76 of the *Act*.

85. *R.* v. *Hoval* (unreported 1958) referred to in R. J. Roberts, ROBERTS ON COMPETITION/ANTITRUST: CANADA AND THE UNITED STATES, 2d ed. (Toronto: Butterworths, 1992) at 161.

86. Restrictive Trade Practices Commission, *Report relating to the Distribution and Sale of Mary Maxim Knitting Wool, Patterns and Accessories thereof in Canada*, Report of the Director (1966) at 59. The supplier was found to have breached the section because it was negligent in classifying its customers for the purposes of giving volume discounts. Volume requirements were not clearly determined, purchases were not tracked effectively and no period was established for determining whether volume requirements were met.

87. The 3 convictions are: *R.* v. *Simmons* (unreported, Ont. Prov. Ct. (Crim. Div.), October 15, 1984)($15,000 fine on each of two counts and prohibition order); *R.* v. *Neptune Motors*, [1986] C.C.L. 7046 (Ont. Dist. Ct.)($50,000 fine); *R.* v. *Jacques Perreault* (unreported, Quebec Superior Court, June 16, 1996)(one (1) year prison term). Other cases have proceeded to court but did not result in convictions. A prohibition order was issued in *R.* v. *Station Mont. Tremblant Lodge* (unreported, Federal Court Trial Division, April 6, 1989). At least two section 36 cases have dealt

with price discrimination allegations: *Hurtig Publishers* v. *W.H. Smith* (1989), 99 A.R. 70 (Q.B.); and *Acier d'Armature Rô Inc.* v. *Stelco* (1996), 69 C.P.R. (3d) 204 (Que. C.A.).

88. The provision was described as "generally ineffective" in *Proposals for a New Competition Policy for Canada, Second Stage: Combines Investigation Act Amendments* (Ottawa, Consumer and Corporate Affairs, 1977) at 63.

89. Davies, Ward & Beck, COMPETITION LAW OF CANADA (New York: Juris Publishing, looseleaf) at 4-4 - 4-9, L.A.W. Hunter & S.M. Hutton, "Is the Price Right: Comments on the *Predatory Pricing Enforcement Guidelines* and *Price Discrimination Enforcement Guidelines* of the Bureau of Competition Policy" (1993) 38 McGill L. J. 830 at 864-5 .

90. Industry Canada (Ottawa: Queen's Printer, 1992).

91. L.A.W. Hunter& S.M. Hutton, "Is the Price Right: Comments on the *Predatory Pricing Enforcement Guidelines* and *Price Discrimination Enforcement Guidelines* of the Bureau of Competition Policy" (1993) 38 McGill L. J. 830 at 865; Davies, Ward & Beck, COMPETITION LAW OF CANADA (New York: Juris Publishing, looseleaf) at 4-6.

92. *Discussion Paper: Competition Act Amendments* (Ottawa: Industry Canada, 1995) at 19-20.

93. *Report of the Consultative Panel on Amendments to the Competition Act* (1996) at 29-30.

94. Speech to Canadian Institute, Toronto, May 10, 1996 at 19-20.

95. *Price Discrimination Enforcement Guidelines* at 3.

96. A functional discount was upheld in *R.* v. *William E. Coutts*, [1968] 1 O.R. 550 (H.C.J.), aff'd [1968] 1 O.R. 549 (C.A.). In that case the purchaser receiving the discount because it test marketed a new style of greeting card for the supplier.

97. *R.* v. *Simmons* (unreported, Ont. Prov. Ct. (Crim. Div.), October 15, 1984).

98. L.A.W. Hunter & S.M. Hutton, "Is the Price Right: Comments on the *Predatory Pricing Enforcement Guidelines* and *Price Discrimination Enforcement Guidelines* of the Bureau of Competition Policy" (1993) 38 McGill L. J. 830 at 853; Davies, Ward & Beck, COMPETITION LAW OF CANADA (New York: Juris Publishing, looseleaf) at 4-18 - 4-24.

99. *E.g.* ss. 61(2) and 77(4).

100. Sale has been clearly defined in Anglo-Canadian law since *Helby* v. *Matthews* [1895-99] All ER Rep. 821; [1895] AC 471 (H.L.). The treatment of affiliates in the *Guidelines* has been criticized

in Davies, Ward & Beck, COMPETITION LAW OF CANADA (New York: Juris Publishing, looseleaf) at 4-27 to 4-30 and L.A.W. Hunter & S.M. Hutton, "Is the Price Right? Comments on the *Predatory Pricing Enforcement Guidelines* and *Price Discrimination Enforcement Guidelines* of the Bureau of Competition Policy" (1993) 38 McGill L. J. 830 at 851. By contrast, Roberts suggests that a court may agree with the Bureau's interpretation (R. J. Roberts, ROBERTS ON COMPETITION/ANTITRUST: CANADA AND THE UNITED STATES, 2d ed. (Toronto, Butterworths, 1992) at 156).

101. L.A.W. Hunter & S.M. Hutton, *ibid.* at 856-7 raise this issue as well as the logic of treating franchise units as a economic unit. The interests may diverge, for example, where the franchisor retains the benefit of any discount based on system volume. The authors raise similar concerns with respect to the *Guidelines* acceptance of international volume price discounts granted to a Canadian subsidiary of a multinational corporation as a consequence of the volume of sales to all corporations affiliated with the multinational.

102. *Robinson-Patman Act*, 49 Stat. 1526 (1936), s. 3.

103. *Clayton Act*, originally enacted as 38 Stat. 730 (1914), now 15 U.S.C. s. 13.

104. *Clayton Act*, s. 4, 14 U.S.C. s.15.

105. The jurisdiction of the Federal Trade Commission is created by the *Federal Trade Commission Act* (originally enacted as 38 Stat. 717-721 (1914) s. 5, now15 U.S.C. s. 45) which empowers the Commission to prevent the use of unfair methods of competition in or affecting commerce. In this regard the Federal Trade Commission performs functions analogous to those of both the Competition Bureau and the Competition Tribunal. The Commission may also obtain relief from the courts including preliminary injunctive relief (s. 13(b), 15 U.S.C. s. 53(b)) where there is a "fair and tenable chance of ultimate success on the merits (*FTC* v. *Beatrice Foods Co.*, 587 F. 2d. 1225 (D.C. Cir., 1979)).

106. Department of Justice, *Report on The Robinson-Patman Act* (January, 1977); Speech by Donald I. Baker, Assistant Attorney-General responsible for the Antitrust Division of Department of Justice, "Robinson-Patman Revisited" (March 18, 1977).

107. F. Mathewson & R. Winter, "The Law and Economics of Vertical Restraints" in THE LAW AND ECONOMICS OF COMPETITION POLICY, F. Mathewson, M. Trebilcock & M. Walker, eds. (Vancouver: Fraser Institute, 1990) at 115. U. S. courts have noted the inconsistency between the *Robinson-Patman Act* and prevailing antitrust thinking and held that the *Act* should be interpreted in a manner which is consistent with such thinking to the extent possible (*e.g. Brooke Group* v. *Brown and Williamson Tobacco Corp.*, 509 U.S. 209 (1993); *but see Chroma Lighting* v. *GTE Products Corp.* 11 F. 2d 653 (9th Cir., 1997)).

108. Discounts which are equally and realistically available to all competitors or that are granted in return for some service are also permitted.

109. R. J. Roberts, ROBERTS ON COMPETITION/ANTITRUST: CANADA AND THE UNITED STATES, 2d ed. (Toronto: Butterworths, 1992) at 139, 147, 159.

110. *U.S.* v. *U.S. Gypsum Co.* 1977 CCH Trade Cas. ¶61238 (3d. Cir., 1977).

111. Originally enacted as 26 Stat. 209 (1890)s. 2, now 15 U.S.C. s. 2.

112. *Sherman Act* (15 U.S.C. s. 2). B. E. Hawk, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE (New York: Aspen Law and Business, 1996)(Vol. 2) at 862. The *Sherman Act* may be enforced civilly or criminally by the Antitrust Division of the Department of Justice and the Federal Trade Commission.

113. *Treaty of Rome*, 298 U.N. T.S. 11 (March 25, 1957).

114. The article numbers of the *Treaty of Rome* were changed by the *Amsterdam Treaty*, in force May 1, 1999. Article 81 was formerly Article 85 and Article 82 was formerly article 86.

115. Under Article 81, the price discrimination would also have to affect trade between member states.

116. Article 82 provides as follows:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar condition to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

117. *Tetra Pak II*, OJ 1992 L72/1, [1992] 4 CMLR 551.

118. *Suiker Unie* v. *Commission*, [1975] ECR 163, 2003 [1976] 1 CMLR 295, 472; *Hoffman-La Roche*, OJ 1976 L223/27, [1976] 2 CMLR D25 §60; *BPB Industries/British Gypsum*, Case T-65/89, judgement of 1 April 1993.

119. B. E. Hawk, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE (New York: Aspen Law and Business, 1996)(Vol. 2).

120. *Napier Brown/British Sugar*, OJ 1988 L284/91.

121. Indeed the provision has been criticized in Canada at least since 1969 when the Economic Council of Canada released its *Interim Report on Competition Policy* (Ottawa: Queen's Printer, 1969) at 122.

122. Amendment of the price discrimination provision to permit other cost justified discrimination in the form of functional discounts was recommended in *Proposals for a New Competition Policy for Canada, second stage: Combines Investigation Act Amendments March 1977* (Ottawa: Consumer and Corporate Affairs, 1977) at 63.

123. In the United States, the cost justification rule has been strongly criticized as costly and, ultimately, unworkable in practice. The American concerns need to be put in context. The cost justification defence is one of only two defences to the strict U.S. law on price discrimination.

124. Permitting cost justification as a general defence was recommended in L.A. Skeoch & B.C. McDonald, *Dynamic Change and Accountability in a Canadian Market Economy* (Ottawa: Queen's Printer, 1976).

125. The *Competition Act* is not uniform in how it deals with anticompetitive effect. Section 77 contains an effect on competition test. Section 75 requires that a person cannot get adequate supply because of inadequate competition and section 80 requires that delivered pricing be by a dominant supplier or be widespread in a market and that the customer is "denied an advantage that would otherwise be available to him." Section 76, dealing with the use of consignment arrangements to implement price discrimination, is anomalous since it is in the civil section but contains no competitive effect test.

126. L.A. Skeoch & B.C. McDonald, *Dynamic Change and Accountability in a Canadian Market Economy* (Ottawa: Queen's Printer, 1976). The Economic Council of Canada reached the same conclusion in its *Interim Report on Competition Policy* (Ottawa: Queen's Printer, 1969).

127. B. E. Hawk, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE (New York: Aspen Law and Business, 1996)(Vol. 2).

128. *Ibid.* at 866. Hawk suggests that the E.U. is getting less tolerant of price discrimination, while the U.S. is becoming more tolerant (at 872).

129. Corley suggests that price discrimination "may be required for the development of socially valuable new products and services to be economically feasible" (R. D. Corley, "IP and Competition Law: Enforcement Challenges of the Information Economy" presented to Canadian Bar Association, Annual Competition Law Conference (1999) at 12)).

130. The *Guidelines* do say that where price discrimination is engaged in by a dominant firm for the purpose of impeding or preventing the entry of a competitor or potential competitor, or to coerce discriminatory discounts from suppliers with the effect that competition is or is likely to be substantially lessened, the Commissioner will review the practice under s. 79 (Appendix 1).

131. There is an oblique reference to the use of "other provisions of the *Competition Act*" to deal with such a situation in 2.2 of the *Price Discrimination Enforcement Guidelines*.

132. (1980), 28 O.R. (3d) 164; aff'd (1981), 125 D.L.R. (3d) 607 (C.A.).

133. *R.* v. *Perreault* (unreported, Que. Superior Court, June 16, 1996).

134. *R.* v. *Producers' Dairy* (1966), 50 C.P.R. (2d) 265. In *Boehringer* v. *Bristol Meyers Squibb*, [1998] O.J. No. 4007 (Q.L.)(Ont. C.A.), the court determined that matching a competitor's price, even if below cost, cannot be predatory, following *Hoffman-La Roche*. The court also refused to grant an injunction prohibiting the alleged predator from selling below cost on the additional ground that prices were inherently volatile and plaintiff would have been free to sell below cost.

135. (1980), 28 O.R. (2d) 164, aff'd (1981), 125 D.L.R. (3d) 607 (C.A.).

136. This is consistent with the statement in *Hoffman-La Roche* that "[i]f an article is sold for more than cost it can never be held to be unreasonable" ((1980), 28 O.R. (2d) 164, at 200 (H.C.J.), aff'd (1981), 125 D.L.R. (3d) 607 (C.A.)). There have been several private cases in which an allegation of predatory pricing have been raised: *947101 Ontario Limited Ltd.* v. *Barrhaven Town Centre Inc. et al.* (1995), 121 D.L.R. (4th) 748 (Ont. Ct. Gen. Div.); *Mansoor Electronics Ltd.* v. *BCE Mobile Communications Inc. et al.* (1995), 64 C.P.R. (3d) 165 (F.C.T.D.); and *Boehringer* v. *Bristol Meyers Squibb*, [1998] O.J. No. 4007 (Q.L.)(Ont. C.A.).

137. The defensive character of low prices set by alleged predators resulted in acquittals in several cases where price was above average variable cost: *R.* v. *Consumers Glass* (1981), 33 O.R. (2d) 228 (H.C.); *R.* v. *Producers' Dairy* (1966), 50 C.P.R. (2d) 265 (Ont. C.A.); *R.* v. *Ray* (unreported, Police Court, South Burnaby, B.C., Dec. 11, 1957); *R.* v. *Howard* (unreported, Police Court, South Burnaby, B.C., March 19, 1958) and *R.* v. *Fairmont Plating (Alta.) Ltd. and Fairmont Industries Ltd.* (unreported, Alta. S.C., January 17, 1977), cited in Davies, Ward & Beck, COMPETITION LAW OF CANADA (New York: Juris Publishing, looseleaf) at 4-82.

138. *R.* v. *Hoffman-La Roche* (1980), 28 O.R. (2d) 164, at 201 (H.C.J.), aff'd (1981), 125 D.L.R. (3d) 607 (C.A.).

139. (1995), 121 D.L.R. (4th) 748 (Ont. Gen. Div.) at 760-761.

140. *Hoffman-La Roche* (1980), 28 O.R. (2d) 164, at 254 (H.C.J.), aff'd (1981), 125 D.L.R. (3d) 607 (C.A.).

141. *Ibid.* at 201, 204.

142. *See*, for example, *Director of Investigation and Research* v. *Hillsdown Holdings* (1992), 41 C.P.R. (3d) 289 at 328-9 (Comp. Trib.).

143. *R.* v. *Consumers Glass* (1981), 33 O.R. (2d) 228 (H.C.J.).

144. *R.* v. *Perreault* (unreported, Que. Sup. Ct., June 16, 1996,). A consent order was issued in *R.* v. *Allen Sloman Enterprises Ltd.* (unreported, Federal Court of Canada, May 29, 1972). One other case involving s. 50(1)(b) resulted in an acquittal: *R.* v. *Carnation* (1969), 58 C.P.R. 112 (Alta. C.A.).

145. Organization for Economic Cooperation and Development, *Predatory Pricing* (Paris: OECD, 1989) at 82.

146. The *Merger Enforcement Guidelines* define the relevant market "in terms of the smallest group of products and smallest geographic area in relation to which sellers, if acting as a single firm (a "hypothetical monopolist") that was the only seller of those products in that area, could profitably impose and maintain a significant non-transitory price increase above levels that would exist in the absence of the merger" (at 7). The application of this standard is elaborated in Part 3 of the *Merger Enforcement Guidelines*.

147. *Predatory Pricing Enforcement Guidelines* at 2.2.1.1.

148. *Ibid.* at 2.2.1.2.

149. Part 4.6, at 33-36, Appendix I.

150. Davies, Ward & Beck, COMPETITION LAW OF CANADA (New York: Juris Publishing, looseleaf) at 4-85.

151. For this to be the case, capital markets must be inefficient. Otherwise all entry costs may be financed so long as there is a promised expected rate of return commensurate with the risk. *See* D.G. McFetridge, "Predatory and Discriminatory Pricing" in THE LAW AND ECONOMICS OF COMPETITION POLICY, F. Mathewson, M. Trebilcock & M. Walker, eds. (Vancouver: Fraser Institute, 1990).

152. Economies of scale means that unit costs are lower at higher levels of production. Economies of scope arise where it is cheaper to jointly produce two or more products than to produce each separately. *See Predatory Pricing Enforcement Guidelines*, s. 2.2.1.2.

153. L.A.W. Hunter & S.M. Hutton, "Is the Price Right: Comments on the *Predatory Pricing Enforcement Guidelines* and *Price Discrimination Enforcement Guidelines* of the Bureau of Competition Policy" (1993) 38 McGill L. J. 830 at 839-810.

154. *Predatory Pricing Enforcement Guidelines*, s. 2.2.1.2. Some of these practices are reviewable under the *Competition Act* ss. 76, 77 and 79.

155. *Hoffman-La Roche* (1980), 28 O.R. (2d) 164, at 197 (H.C.J.), aff'd (1981), 125 D.L.R. (3d) 607 (C.A.).

156. In *Upper Lakes Group Inc.* v. *National Transportation Agency* (1995), 62 C.P.R. (3d) 167 (F.C.A.), a decision interpreting a provision of the *National Transportation Act, 1987*, R.S.C. 1985, c. 28 (3d Supp.) similar to s. 50(1)(c), the Federal Court affirmed the National Transportation Agency's decision that CN's rates were not predatory based on there being no prospect of recoupment.

157. *Predatory Pricing Enforcement Guidelines*, 2.2.2.

158. *Ibid.*

159. *R.* v. *Consumers Glass* (1981), 33 O.R. (2d) 228 (H.C.J.). Excess capacity is also recognized as a justification for pricing in the grey area by the OECD, Organization for Economic Co-operation and Development, *Predatory Pricing* (Paris: OECD 1989) at 82-3.

160. *Predatory Pricing Enforcement Guidelines*, at 2.2.2.

161. L.A. Skeoch & B C. McDonald, *Dynamic Change and Accountability in a Canadian Market Economy* (Ottawa: Queen's Printer, 1976) at 218-219.

162. *Predatory Pricing Enforcement Guidelines*, at 2.2.2.

163. L.A.W. Hunter & S.M. Hutton, "Is the Price Right? Comments on the *Predatory Pricing Enforcement Guidelines* and *Price Discrimination Enforcement Guidelines* of the Bureau of Competition Policy" (1993) 38 McGill L. J. 830 at 854.

164. Davies, Ward & Beck, COMPETITION LAW OF CANADA (New York: Juris Publishing, looseleaf) at 4-89 - 4-91 gives examples of language reflecting aggressive competition versus predation from the *Hoffman-La Roche* case. On the difficulty of assessing intention from statements made see J. R. Lott, ARE PREDATORY COMMITMENTS CREDIBLE? WHO SHOULD THE COURTS BELIEVE? (Chicago: University of Chicago Press, 1999) at 7; and *R.* v. *Consumers Glass* (1981), 33 O.R. (2d) 228 (H.C.J.).

165. L.A.W. Hunter & S.M. Hutton argue the *Guidelines* adopt a purposive interpretation focusing on the harm that the section was intended to address ("Comments on the *Predatory Pricing Enforcement Guidelines* and *Price Discrimination Enforcement Guidelines* of the Bureau of Competition Policy" (1993) 38 McGill L. J. 830 at 836).

166. Davies, Ward & Beck, COMPETITION LAW OF CANADA (New York: Juris Publishing, looseleaf) at 4-88. Statements acknowledging the limited likelihood of deviating from the requirements of the two stage test are the following: "If it appears that entry or expansion would likely occur on a sufficient scale to constrain the ability of the alleged predator to recoup its initial losses at a later time, the Director would have less concern" (2.2.1.2); "evidence which may suggest an intent to lessen competition or eliminate a competitor, which is not backed up by the market power to realize these goals, is less likely to be pursued" (2.4).

167. T. Calvani "Predatory Pricing and below-cost sales laws in the United States: an analysis" (Ottawa: Competition Bureau, 1999).

168. 881 F. 2d 1396 (7th Cir., 1989), *cert. denied* 494 U.S. 1019. For a brief history of the evolution of U.S. antitrust law on predation see T. Calvani, *ibid.*

169. *Ibid.* at 1401.

170. *Ibid.* at 1401-2.

171. *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

172. T. Calvani "Predatory Pricing and below-cost sales laws in the United States: an analysis (Ottawa: Competition Bureau, 1999) at 3-4;. D.G. McFetridge, "Predatory and Discriminatory Pricing" in THE LAW AND ECONOMICS OF COMPETITION POLICY, F. Mathewson, M. Trebilcock & M. Walker, eds. (Vancouver: Fraser Institute, 1990) at 92.

173. W.H. Jordan, "Predatory Pricing after *Brooke Group*: The Problem of State 'Sales Below Cost' Statutes" (1995) 44 Emory L. J. 267.

174. E. Savvides-Gellerson, "The Effect of 'Below-Cost' Selling Laws on Retail Prices of Motor Gasoline" (API Research Study 043 1987).

175. R. Johnson, "The Impact of Sales Below Cost Laws on the U.S. Retail Gasoline Market (Ottawa: Competition Bureau, 1999). In another recent study by an economist at the Federal Trade Commission, it was found that another form of intervention, divorcement statutes, which prohibits the integration of refiners and retailers raises the price of gasoline by $.027 per gallon, reducing consumers surplus in the United States by over US$100 million (M.G. Vita, "Regulatory Restrictions on Vertical Integration and Control: the Competitive Impact of Gasoline Divorcement Statutes," Working Paper No. 227 (Washington: Bureau of Economics, Federal Trade Commission, 1999)). Ontario, New Brunswick, Newfoundland and British Columbia have considered and rejected proposals for legislation in the gasoline marketing industry. Legislation in Nova Scotia was repealed. Quebec has enacted a regulatory scheme for gasoline margins. Prince Edward Island regulates the prices of gasoline sold at retail.

176. [1991] 1 ECR 3359. This position was confirmed in *Tetra Pak II*, OJ 1992 L72/1, [1992] 4 CMLR 551.

177. *Ibid.* at §72. Where pricing was below cost and it was reasonably forseeable that a competitor would go out of business, an abuse was found (*Napier Brown/British Sugar*, OJ 1988 C284/91 (Commission).

178. The interpretation of the Competition Act, 1980 in the U.K. closely follows that set out in the *Guidelines* (see M. A. Utton, "Anticompetitive Practices and the Competition Act, 1980" University of Reading, Department of Economics Discussion Papers in Industrial Economics, Series E Vol. III (1990/1) No. 24. at 31).

179. If business people are only presumed to be utility maximizing, then economic theory will countenance predatory behaviour which is not profit maximizing but engaged in for other reasons, such as a personal satisfaction gained from eliminating competitors.

180. Davies, Ward & Beck, COMPETITION LAW OF CANADA (New York: Juris Publishing, looseleaf) at 4-68. The authors identify the consequent risk of s. 36 actions.

179. *An Act to amend the Combines Investigation Act*, S.C. 1951 (2d sess.), c. 30, s. 1. The provision was slightly revised by S.C. 1952, c. 39, s. 4.

180. S.C. 1960, c. 34, s. 14.

181. An excellent overview of the legislative history of price maintenance provisions is set out in Davies, Ward & Beck, COMPETITION LAW OF CANADA (New York: Juris Publishing, looseleaf) at 4-97- 4-100.

182. Where the person attempting to influence the conduct of that other person and that other person are affiliated or principal and agent, the prohibition does not apply (*Competition Act*, s. 61(2)).

183. *R.* v. *Les Must de Cartier Can. Inc.* (1989), 27 C.P.R. (3d) 37 (Ont. Dist. Ct.).

184. *Competition Act*, s. 61(9).

185. *R.* v. *Schelew* (1984), 78 C.P.R. (2d) 102 (N.B.C.A.).

186. *R.* v. *Sunoco* (1986), 11 C.P.R. (3d) 557 (Ont. Dist. Ct.); *R.* v. *Petrofina Can. Ltd.* (1974), 20 C.P.R. (2d) 83 (Ont. Dist. Ct.).

187. *R.* v. *Mr. Gas Limited* (unreported, Ont. Ct. of Justice (Crim. Div.), August 11, 1995) at 82.

188. See cases cited in Davies, Ward & Beck, COMPETITION LAW OF CANADA (New York: Juris Publishing, looseleaf) at 4-112.

176. [1991] 1 ECR 3359. This position was confirmed in *Tetra Pak II*, OJ 1992 L72/1, [1992] 4 CMLR 551.

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186. *R.* v. *Sunoco* (1986), 11 C.P.R. (3d) 557 (Ont. Dist. Ct.); *R.* v. *Petrofina Can. Ltd.* (1974), 20 C.P.R. (2d) 83 (Ont. Dist. Ct.).

187. *R.* v. *Mr. Gas Limited* (unreported, Ont. Ct. of Justice (Crim. Div.), August 11, 1995) at 82.

188. See cases cited in Davies, Ward & Beck, COMPETITION LAW OF CANADA (New York: Juris Publishing, looseleaf) at 4-112.

189. *R.* v. *Royal Lepage Real Estate Services Ltd.* (unreported, Alberta Court of Queen's Bench, October 24, 1994).

190. *Competition Act*, s. 61(3).

191. *Competition Act*, s. 61(4). No offence is committed if a suggested resale price is affixed or applied to a product or its package or container (s. 61(5)).

192. *R.* v. *Phillips Electronics Ltd.* (1980), 30 O.R. (2d) 129 (C.A.).

193. *E.g.* Davies, Ward & Beck, COMPETITION LAW OF CANADA (New York: Juris Publishing, looseleaf) at 4-119 - 4-120.

194. *R.* v. *Royal Lepage Real Estate Services* (unreported Alberta Court of Queen's Bench, October 24, 1994) at para. 33.

195. *Competition Act*, s. 61(10).

196. *R.* v. *Salomon Can. Sports Ltée* (1986), 28 C.C.C. (3d) 240 at 247, 251 (Qué. C.A.).

197. *R.* v. *William E. Coutts Co.* (1968), 67 D.L.R. (2d) 87 (Ont. C.A.) at 93. In that case a one week sale at 2 locations was considered sufficient to constitute a practice. This definition of practice has been applied in *Director of Investigation and Research* v. *NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.), a case interpreting the abuse of dominance provision, s. 79.

198. (1980), 57 C.P.R. (2d) 186 (Qué. Sess. of Peace) at 198-199. In that case it was also held that the provision only applied to after sales service. In *R.* v. *Les Must de Cartier Can. Inc.* (1989), 27 C.P.R. (3d) 37 (Ont. Dist. Ct.) the court held that refusal to supply in the interests of preserving the brand image of the supplier's product was permitted. *See generally*, R. J. Roberts, ROBERTS ON COMPETITION/ANTITRUST: CANADA AND THE UNITED STATES, 2d ed. (Toronto: Butterworths, 1992) at 181-4 and S. Wong, "The Law of Price Maintenance in Canada: Review and Assessment" in R. S. Khemani & W. T. Stanbury, eds. CANADIAN COMPETITION LAW AND POLICY AT THE CENTENARY (Halifax: Institute for Research on Public Policy, 1991) 339 at 347-8.

199. *E.g. R.* v. *Campbell* (1979), 51 C.P.R. (2d) 284 (B.C. Co. Ct.); and *R.* v. *Mr. Gas Limited* (unreported, Ont. Ct. of Justice (Prov. Div.), August 11, 1996).

200. 220 U.S. 373 (1911). Amendments to the *Sherman Act* in 1937 and 1952 made resale price maintenance legal in most settings. These amendments were repealed in 1975 and resale price maintenance was again a *per se* violation. Resale price maintenance may also be contrary to s. 5 of the *Federal Trade Commission Act* (15 U.S.C. s. 45) and, in some circumstances, dealt with as a part of a conspiracy to monopolize, contrary to s. 2 of the *Sherman Act* (15 U.S.C. s. 2).

201. *U.S.* v. *Colgate & Co.*, 250 U.S. 300 (1919).

202. *U.S.* v. *Parke, Davis & Co.*, 362 U.S. 26 (1960); *Acquaire* v. *Canada Dry Bottling Co.*, 24 F. 2d. 401 (2d Cir., 1994).

203. *United States* v. *General Electric*, 272 U.S. 476 (1926).

204. *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964).

205. *U.S.* v. *Colgate* & Co., 250 U.S. 300 (1919).

206. 465 U.S. 752 (1984).

207. *Business Electronics Corp.* v. *Sharp Electronics Corp.* No. 85-1910 U.S.S.C. 1988.

208. F. Mathewson & R. Winter, "The Law and Economics of Vertical Restraints," in THE LAW AND ECONOMICS OF COMPETITION POLICY, F. Mathewson, M. Trebilcock & M. Walker, eds. (Vancouver: Fraser Institute, 1990) at 115-116.

209. "Opening Markets and Protecting Competition for America's Businesses and Consumers" speech by Anne K. Bingaman, Assistant Attorney-General, Antitrust Division, Department of Justice, April 7, 1995.

210. *Italian Flat Glass*, OJ L33 (Dec. 7, 1988). In that case, the price maintenance practice was engaged in by a shared monopoly.

211. *VBBB/VBVB*, OJ 1982 L54/36.

212. *Pronuptia de Paris* v. *Irmgard Schillgalli*, [1989] ECR 353.

213. *AEG* v. *Commission*, [1983] ECR 3151.

214. F. Mathewson & R. Winter, "The Law and Economics of Resale Price Maintenance" (1998) 13 Rev. of Indust. Org. 57.

215. In R. T. Hughes & T. N. Patel, "Current Issues Involving the Price Maintenance Provisions of the *Competition Act*" ((1996) 17 Comp. Pol. Rec. 40) the different treatment was of price maintenance and refusal to supply regarding the availability of the defences was described as "anomalous" (at 49).

216. T.W. Ross, "Introduction: The Evolution of Competition Law in Canada" (1998) 13 Rev. of Indust. Org. 1 at 19.

217. R.S.C. 1970, c. C-23, s. 33. Predatory behaviour formed part of the basis for the conviction of the accused in *R.* v. *Eddy Match* (1927), 109 C.C.C. 14 (Que. C.A.).

218. *Alex Couture Inc.* v. *Canada* (1991), 38 C.P.R. (3d) 293 (Que. C.A.) at 324.

219. The former criminal provision required proof beyond a reasonable doubt and the Bureau had never been successful in proving that the lessening of competition would operate "to the detriment or against the interest of the public" beyond a reasonable doubt. The standard of proof before the Tribunal is on the balance of probabilities.

220. *Competition Act*, s. 79(2), (3) and (5).

221. *Director of Investigation and Research* v. *NutraSweet* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.) at 9-10.

222. In *Director of Investigation and Research v. Laidlaw Waste Systems Ltd.* ((1992), 20 C.P.R. (3d) 289 (Comp. Trib.) at 316), the Tribunal held that it is only the existing situation which is relevant for the purposes of this inquiry. See generally R. D. Anderson & J. Monteiro, *Market Definition in Abuse of Dominance Cases: The Pragmatic Approach of the Competition Tribunal* (September 1, 1994). The determination of product market should be made using the substitutability test based on buyer price sensitivity adopted in *Director of Investigation and Research* v. *NutraSweet*, *ibid.*, *Laidlaw* (at 320); *Canada* v. *D. and B. Companies* (1995), 64 C.P.R. (3d) 216 (Comp. Trib.)(hereinafter "*Nielsen*") (at 241), and *Canada* v. *Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. 1 (Comp.Trib.), rather than the hypothetical monopolist test used in the *Merger Enforcement Guidelines*. (A. N. Campbell, MERGER LAW AND PRACTICE (Toronto: Carswell, 1997) at 54-77). The substitutability test is a general standard: Products are in the same market if they are close substitutes in the sense that small price changes would cause buyers to switch from one to the other. This is a difficult test to apply in practice and the Tribunal has indicated that what factors are relevant will depend on the circumstances of each case (*Nielsen* at 241). This test was accepted by the Supreme Court of Canada in *Director of Investigation and Research* v. *Southam*, ([1997] 1 S.C.R. 748 at 759-760). Since direct evidence of substitutability is rarely available, recourse may be had to indirect evidence such as the "physical characteristics of the products, the uses to which the products are put, and whatever evidence there is about the behaviour of buyers that casts light on the willingness to switch from one product to another in respond to changes in relative prices" (at 759-760), quoting the Tribunal. The Supreme Court has held that weighing the criteria is a matter within the discretion of the Tribunal to be exercised in accordance with the facts of each case (at 781). The substitutability test has also been applied in a criminal context in *R.* v. *Clarke Transport Inc.* (1995), 64 C.P.R. (3d) 289 (Ont. Ct. Gen. Div.) at 310-311.

223. *Director of Investigation and Research* v. *NutraSweet*, *ibid.* at 10. In *Director of Investigation and Research* v. *Laidlaw Waste Systems Ltd., ibid.*, the Tribunal considered the anticompetitive acts to assess whether there was market power.

224. *Director of Investigation and Research* v. *Laidlaw Waste Systems Ltd.*, *ibid.*, at 325; *Director of Investigation and Research* v. *NutraSweet*, *ibid.*, at 28; *Canada* v. *Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. 1 (Comp.Trib.); and *Canada* v. *D. and B. Companies* (1995), 64 C.P.R. (3d) 216 (Comp. Trib.).

225. *Director of Investigation and Research* v. *NutraSweet*, *ibid.* at 28.

226. *Director of Investigation and Research* v. *Laidlaw Waste Systems Ltd.* (1992), 20 C.P.R. (3d) 289 (Comp. Trib.) at 325; *Canada* v. *D. and B. Companies* (1995), 64 C.P.R. (3d) 216 (Comp. Trib.) at 257. In *Canada* v. *Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. 1 (Comp. Trib.) at 85), however, it was held that the absence of barriers to entry will mean that dominant firms cannot exercise market power. This suggests that barriers to entry should always be considered one of the prerequisites of *effective* market power. No other kind of market power is relevant.

227. *Director of Investigation and Research* v. *NutraSweet* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.) at 9-10. (95%); *Director of Investigation and Research* v. *Laidlaw Waste Systems Ltd.*, *ibid.* (87%); *Canada* v. *D. and B. Companies, ibid.* (100%); *Canada* v. *Tele-Direct (Publications) Inc, ibid.* (96%).

228. (Ottawa: Industry Canada, 1991), s. 4.2.1.

229. *Director of Investigation and Research* v. *NutraSweet* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.); *Director of Investigation and Research* v. *Laidlaw Waste Systems Ltd.* (1992), 20 C.P.R. (3d) 289 (Comp. Trib.); *Canada* v. *D. and B. Companies* (1995), 64 C.P.R. (3d) 216 (Comp. Trib.).

230. *Director of Investigation and Research* v. *Laidlaw Waste Systems Ltd.*, *ibid.* at 325.

231. *E.g. Director of Investigation and Research* v. *NutraSweet* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.), *Director of Investigation and Research* v. *Laidlaw Waste Systems Ltd., ibid.*, *Canada* v. *D. and B. Companies* (1995), 64 C.P.R. (3d) 216 (Comp. Trib.); *Canada* v. *Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. 1 (Comp. Trib.).

232. Intent evidence, may, however, be considered *Director of Investigation and Research* v. *Laidlaw Waste Systems Ltd.*, *ibid.*

233. *Director of Investigation and Research* v. *NutraSweet* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.) at 57.

234. *Director of Investigation and Research* v. *Laidlaw Waste Systems Ltd.* (1992), 20 C.P.R. (3d) 289 (Comp. Trib.) at 332, 343, and *Canada* v. *D. and B. Companies* (1995), 64 C.P.R. (3d) 216 (Comp. Trib.) at 257.

235. *Director of Investigation and Research* v. *Laidlaw Waste Systems Ltd.* (1992), 20 C.P.R. (3d) 289 (Comp. Trib.).

236. *Canada* v. *D. and B. Companies* (1995), 64 C.P.R. (3d) 216 (Comp. Trib.) at 270-271; *Canada* v. *Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. 1 (Comp.Trib.) at 235.

237. *Director of Investigation and Research* v. *NutraSweet* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.) at 35.

238. *Director of Investigation and Research* v. *NutraSweet*, *ibid.*, at 47.

239. *Canada* v. *D. and B. Companies* (1995), 64 C.P.R. (3d) 216 (Comp. Trib.) at 267.

240. *Ibid.* at 266; *Director of Investigation and Research* v. *NutraSweet* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.) at 47.

241. *Canada* v. *D. and B. Companies, ibid.*; *Director of Investigation and Research* v. *NutraSweet*, *ibid.*

242. Efficiency defences were not accepted in *NutraSweet*, *ibid.*, apparently because of strong evidence of exclusionary intent (at 68-69, 90). This aspect of the decision is criticized in J. Church & R. Ware, "Abuse of Dominance under the 1986 Canadian Competition Act" ((1998) 13 Rev. of Indus. Org. 85 at 103-104). Several commentators have suggested that the result of the decision is that if a firm is dominant and engages in legitimate business practices, which happens to have an exclusionary effect, it may be liable under the abuse of dominance provision. B. M. Graham, "Abuse of Dominance - Recent Case Law: *NutraSweet* and *Laidlaw*" (1993) 38 McGill L. J. 800; J. Musgrove, "Use and Abuse of Dominant Position: A Brief Review of *NutraSweet*, *Laidlaw*, and *Nielsen*" (1995) 16 Canadian Comp. Pol. Rec. 52.

243. *Director of Investigation and Research* v. *NutraSweet*, *ibid.* at 51-2.

244. *Canada* v. *D. and B. Companies* (1995), 64 C.P.R. (3d) 216 (Comp. Trib.); *Canada* v. *Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. 1 (Comp. Trib.).

245. *Ibid.* at 73-78.

246. Squeezing under s. 78(1)(a) was alleged but not found in *Canada* v. *Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. 1 (Comp.Trib.). It was also the main anticompetitive act alleged in the High-Speed Internet access case, an inquiry recently discontinued by the Commissioner. McFetridge suggests that it is possible to interpret s. 78(i) as expressing standard that is breached when an integrated seller sells at retail for price less than its wholesale selling price plus transportation costs (D.G. McFetridge, "Predatory and Discriminatory Pricing" in THE LAW AND ECONOMICS OF COMPETITION POLICY, F. Mathewson, M. Trebilcock & M. Walker, eds. (Vancouver: Fraser

Institute, 1990) at 92-3).

247. Application of the Areeda-Turner standard to determine if there has been squeezing under s. 79 had been suggested by the Restrictive Trade Practices Commission (Restrictive Trade Practices Commission (1987)) within the context of the sale by vertically integrated supplier of gasoline to retailer.

248. *Canada* v. *Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. 1 (Comp. Trib.).

249. *U.S.* v. *Aluminum Co. of America*, 148 F. 2d 416 (2nd Cir. 1945).

250. *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.* 472 U.S. 585 (1985) at 602, 605.

251. W. Holmes, ANTITRUST HANDBOOK (New York: Boardman & Co., 1998) at 404-447.

252. *Hoffman-La Roche* v. *Commission*, [1979] ECR 461. Hawk suggests that it is broader and more vague than the U.S. standard described above (B. E. Hawk, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE (New York: Aspen Law and Business, 1996) (Vol. 2) at 797-799).

253. Goldman and Witterick suggest that it will be hard to apply abuse to vertical practices because of the effect on competition test. (Abuse of Dominance and Monopolization OECD/GD (96) 131, Competition Policy Roundtables No. 8, Contribution from BIAC, Abuse of Dominant Position under the Canadian Competition Act at 4).

254. Section 79(1)(c) refers only to the competitive effect in "a market".

255. J. Musgrove, "Use and Abuse of Dominance: A Brief Review after *NutraSweet*, *Laidlaw* and *Nielsen*" (1995) 16 Comp. Policy Rec. 52.

256. *Director of Investigation and Research* v. *Laidlaw Waste Systems Ltd.* (1992), 20 C.P.R. (3d) 289 (Comp. Trib.).

257. In *Boehringer* v. *Bristol Meyers Squibb* ([1998] O.J. No. 4007 (Q.L.)(C.A.)), the court determined that matching a competitor's price, even if below cost, cannot be predatory, following *Hoffman-La Roche*. The court also refused to grant an injunction prohibiting the alleged predator from selling below cost on the additional ground that prices were inherently volatile and plaintiff would have been free to sell below cost.

258. We reviewed only complaints which were made and concluded with the Review Period.

259. *Competition Act*, s. 11.

260. *Competition Act*, s. 15.

261. *Competition Act*, Part VIII.

262. *Competition Act*, s. 10(1).

263. *Competition Act*, s. 23(1).

264. *Competition Act*, s. 23(2).

265. It is not necessary for the Commissioner to be on inquiry to make an application to the Tribunal, but it is usually the case. In addition to the relief which may be obtained under each specific civil and criminal provision, the *Competition Act* contains general provisions providing for interim relief (ss. 33, 34(2) and 104).

266. *Competition Act*, s. 23(2).

267. W. T. Stanbury, "Expanding Responsibilities and Declining Resources: The Strategic Responses of the Competition Bureau" (1998) 13 Rev. of Indust. Org. 205 at 228. Stanbury recites some other explanations for this trend (at 228-230).

268. W. T. Stanbury, *ibid.*.

269. This overview has some inherent limitations. In some cases multiple complaints were received but they were not all separately recorded in the tracker and may have been the subject of a single project. For example, over 100 complaints were received regarding the auto-glass industry, but they were recorded as a single project file.

270. W. T. Stanbury, "Expanding Responsibilities and Declining Resources: The Strategic Responses of the Competition Bureau" (1998) 13 Rev. of Indust. Org. 2.

271. From 1978 -79 to 1995-96 the Bureau's operating budget increased slightly from $16.7 million to $17.5 in real terms. From 1991-92 to 1995-96, the budget fell 13.5% in real terms. (W. T. Stanbury, *ibid.* at 211-212.) Stanbury notes as well that the costs of key inputs, such as hiring experts has increased and that dealing with challenges under the *Charter of Rights and Freedoms* has taxed resources.

272. There are several explanations for this as discussed in K. Roach & M. Trebilcock, "Private Party Access to the Competition Tribunal" (Ottawa Industry Canada, 1996) at 22-25. *See also* T.W. Ross, "Introduction: The Evolution of Competition Law in Canada" (1998) 13 Rev. of Indust. Org. 1 at 17.

273. J.B. Musgrove, "Remedies for Reviewable Conduct: Adjusting the Balance" (1995) 16 Can. Comp. Pol. Record. 34 at 45. *But see* L. A. W. Hunter, S. M. Hutton, "Is the Price Right: Comments on the *Predatory Pricing Enforcement Guidelines* and *Price Discrimination Enforcement*

Guidelines of the Bureau of Competition Policy (1993) 38 McGill L. J. 830.

274. The voluntary compliance activities are summarized in W. T. Stanbury, "Expanding Responsibilities and Declining Resources: The Strategic Responses of the Competition Bureau" (1998) 13 Rev. of Indust. Org. 201 at 216-221.

275. A practical enforcement issue in predation cases is that relief in the form of a criminal conviction or a successful application to the Tribunal will typically not be obtainable on a timely basis. As a consequence, in some cases of predation, the victim will not survive to see the process through. The victim may be run out of business or bought out by the predator. Examples of both occurred in the predation investigations terminated by the Bureau during the Review Period. There is no technical requirement for the victim to participate in a predation case. Indeed, evidence of a bankrupt or bought out victim may make a charge of predation more credible. Nevertheless, in practice it is difficult to pursue a case without the active help of the complainant. While it is possible to obtain interim relief under the *Act* in both criminal and civil cases, this has not proved to be a useful alternative in such situations.

276. In s. 75 the relevant test is ".. [a] person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms...."

277. Interventions were significant in the hearing on the consent order issued by the Competition Tribunal in the Interac case (*Director of Investigation and Research* v. *Bank of Montreal*, [1996] CCTD. No. 11 (QL)(consent order); [1996] CCTD. No. 12 (QL)(reasons); and [1996] CCTD. No. 1 (QL) (reasons and order granting leave to intervene).

278. Discrimination in sales to affiliates has been alleged in the context of dual distribution industries, for example.

279. F.M. Scherer in "Some Last Words on Predatory Pricing" ((1975-76) 89 Harv. L. Rev. 901 at 903) suggested that an approach like that currently advocated by the Bureau was "impossible to apply in practice".

280. Most of these comments are equally applicable to geographic price discrimination under s. 50(1)(b).

281. A more difficult challenge, but one which has a greater promise of generating a predation regime which is predictable and effective, would be to design a new predatory pricing provision. The elements of such a new provision might include adding, as a further alternative basis of liability, certain specific types of conduct by a firm with market power. The precise elements of such a new provision, especially the specific types of predatory conduct could only be determined by consultation with stakeholders.

282. The same comment was made in relation to U.K. competition law by M. A. Utton, "Anticompetitive Practices and the Competition Act, 1980" University of Reading, Department of Economics Discussion Papers in Industrial Economics, Series E Vol. III (1990/1) No. 24. at 41).

283. Prior to the 1986 amendments to the *Competition Act*, the Restrictive Trade Practices Commission fulfilled this role to some extent by carrying out industry studies.

284. A practical issue in predation cases is that relief in the form of a criminal conviction or a successful application to the Tribunal will typically not be obtainable on a timely basis. As a consequence, in some cases of predation, the victim will not survive to see the process through. The victim may be run out of business or bought out by the predator. Examples of both occurred in the predation investigations terminated by the Bureau during the Review Period. There is no technical requirement for the victim to participate in a predation case. Indeed, evidence of a bankrupt or bought out victim may make a charge of predation more credible. Nevertheless, in practice it is difficult to pursue a case without the active help of the complainant. While it is possible to obtain interim relief under the *Act* in both criminal and civil cases, this has not proved to be a useful alternative in such situations.

285. K. Roach & M. Trebilcock, "Private Party Access to the Competition Tribunal" (Ottawa Industry Canada, 1996). Private litigation has led to a much more robust body of antitrust law in the United States.

286. Consideration might be given, for example, to setting up a small business unit. In Australia, there is a small business ombudsperson.

Appendices

Appendix 1

TERMS OF REFERENCE FOR REVIEW

The purpose of the review is to study some of the provisions of the *Competition Act* dealing with anticompetitive pricing practices by suppliers and powerful competitors and the practices and procedures of the Competition Bureau relating to these provisions. The provisions subject to review are those dealing with predatory pricing, price discrimination and price maintenance and, to the extent that it concerns pricing, abuse of dominance. These provisions are set out in sections 50(1), 61 and 79 of the *Competition Act*.

In particular, the review will focus on the following four areas:

1. Are the provisions of the *Competition Act* adequate in light of today's economic forces?

2. With respect to the Bureau's interpretation of these provisions:
   (a) is the Bureau's interpretation appropriate?
   (b) is the Bureau's interpretation consistent with international practice?
   (c) are the Bureau's enforcement guidelines (s. 50(1)) adequate?
   (d) is there a need for additional enforcement guidelines?

3. Have the Bureau's practices, procedures and guidelines led to the appropriate administration and enforcement of these provisions?

4. Are the Bureau's case selection criteria sufficient to ensure that an adequate number of cases are pursued?

Appendix 2

SELECTED PROVISIONS OF THE *COMPETITION ACT*

Section 1.1

Purpose

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy, and in order to provide consumers with competitive prices and product choices.

Section 50

Illegal trade practices

50. (1) Every one engaged in a business who

> (a) is a party or privy to, or assists in, any sale that discriminates to his knowledge, directly or indirectly, against competitors of a purchaser of articles from him in that any discount, rebate, allowance, price concession or other advantage is granted to the purchaser over and above any discount, rebate, allowance, price concession or other advantage that, at the time the articles are sold to the purchaser, is available to the competitors in respect of a sale of articles of like quality and quantity,
>
> (b) engages in a policy of selling products in any area of Canada at prices lower than those exacted by him elsewhere in Canada, having the effect or tendency of substantially lessening competition or eliminating a competitor in that part of Canada, or designed to have that effect, or
>
> (c) engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have that effect,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Defence

(2) It is not an offence under paragraph (1)(a) to be a party or privy to, or assist in, any sale mentioned therein unless the discount, rebate, allowance, price concession or other advantage was granted as part of a practice of discriminating as described in that paragraph.

Cooperative societies excepted

(3) Paragraph (1)(a) shall not be construed to prohibit a cooperative association, credit union, caisse populaire or cooperative credit society from returning to its members, suppliers or customers the whole or any part of the net surplus made in its operations in proportion to the acquisition or supply of articles from or to its members, suppliers or customers.

Section 51

Definition of "allowance"

51. (1) In this section, "allowance" means any discount, rebate, price concession or other advantage that is or purports to be offered or granted for advertising or display purposes and is collateral to a sale or sales of products but is not applied directly to the selling price.

Grant of allowance prohibited except on proportionate terms

(2) Every one engaged in a business who is a party or privy to the granting of an allowance to any purchaser that is not offered on proportionate terms to other purchasers in competition with the first-mentioned purchaser, which other purchasers are in this section called "competing purchasers", is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Definition of proportionate terms

(3) For the purposes of this section, an allowance is offered on proportionate terms only if

(a) the allowance offered to a purchaser is in approximately the same proportion to the value of sales to him as the allowance offered to each competing purchaser is to the total value of sales to that competing purchaser;

(b) in any case where advertising or other expenditures or services are exacted in return therefor, the cost thereof required to be incurred by a purchaser is in approximately the same proportion to the value of sales to him as the cost of the advertising or other expenditures or services required to be incurred by each competing purchaser is to the total value of sales to that competing purchaser; and

(c) in any case where services are exacted in return therefor, the requirements thereof have regard to the kinds of services that competing purchasers at the same or different levels of distribution are ordinarily able to perform or cause to be performed.

Section 61

Price maintenance

61. (1) No person who is engaged in the business of producing or supplying a product, who extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards, or who has the exclusive rights and privileges conferred by a patent, trade-mark, copyright, registered industrial design or registered integrated circuit topography, shall, directly or indirectly,

> (a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of, the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada; or
>
> (b) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person.

Exception

(2) Subsection (1) does not apply where the person attempting to influence the conduct of another person and that other person are affiliated corporations or directors, agents, officers or employees of

> (a) the same corporation, partnership or sole proprietorship, or
>
> (b) corporations, partnerships or sole proprietorships that are affiliated,

or where the person attempting to influence the conduct of another person and that other person are principal and agent.

Suggested retail price

(3) For the purposes of this section, a suggestion by a producer or supplier of a product of a resale price or minimum resale price in respect thereof, however arrived at, is, in the absence of proof that the person making the suggestion, in so doing, also made it clear to the person to whom the suggestion was made that he was under no obligation to accept the suggestion and would in no way suffer in his business relations with the person making the suggestion or with any other person if he failed to accept the suggestion, proof of an attempt to influence the person to whom the suggestion is made in accordance with the suggestion.

Idem

(4) For the purposes of this section, the publication by a supplier of a product, other than a retailer, of an

advertisement that mentions a resale price for the product is an attempt to influence upward the selling price of any person into whose hands the product comes for resale unless the price is so expressed as to make it clear to any person to whose attention the advertisement comes that the product may be sold at a lower price.

Exception

(5) Subsections (3) and (4) do not apply to a price that is affixed or applied to a product or its package or container.

Refusal to supply

(6) No person shall, by threat, promise or any like means, attempt to induce a supplier, whether within or outside Canada, as a condition of his doing business with the supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons.

(7) and (8) [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 36]

Offence and punishment

(9) Every person who contravenes subsection (1) or (6) is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both.

Where no unfavourable inference to be drawn

(10) Where, in a prosecution under paragraph (1)(b), it is proved that the person charged refused or counselled the refusal to supply a product to any other person, no inference unfavourable to the person charged shall be drawn from that evidence if he satisfies the court that he and any one on whose report he depended believed on reasonable grounds

(a) that the other person was making a practice of using products supplied by the person charged as loss-leaders, that is to say, not for the purpose of making a profit thereon but for purposes of advertising;

(b) that the other person was making a practice of using products supplied by the person charged not for the purpose of selling the products at a profit but for the purpose of attracting customers to his store in the hope of selling them other products;

(c) that the other person was making a practice of engaging in misleading advertising in respect of products supplied by the person charged; or

(d) that the other person made a practice of not providing the level of servicing that purchasers of the products might reasonably expect from the other person.

Section 75

Jurisdiction of Tribunal where refusal to deal

75. (1) Where, on application by the Commissioner, the Tribunal finds that

(a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

(b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

(c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product, and

(d) the product is in ample supply,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

When article is a separate product

(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trade-mark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on business in that class of articles unless that person has access to the article so differentiated.

Definition of "trade terms"

(3) For the purposes of this section, the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

Section 76

Consignment selling

76. Where, on application by the Commissioner, the Tribunal finds that the practice of consignment selling has been introduced by a supplier of a product who ordinarily sells the product for resale, for the purpose of

(a) controlling the price at which a dealer in the product supplies the product, or

(b) discriminating between consignees or between dealers to whom he sells the product for resale and consignees,

the Tribunal may order the supplier to cease to carry on the practice of consignment selling of the product.

Exclusive Dealing, Tied Selling and Market Restriction

Section 77

Definitions

77. (1) For the purposes of this section,

"exclusive dealing"

"exclusive dealing" means

(a) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to

(i) deal only or primarily in products supplied by or designated by the supplier or the supplier's nominee, or
(ii) refrain from dealing in a specified class or kind of product except as supplied by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs;

"market restriction"

"market restriction" means any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to supply any product only in a defined market, or exacts a penalty of any kind from the customer if he supplies any product outside a defined market;

"tied selling"

"tied selling" means

(a) any practice whereby a supplier of a product, as a condition of supplying the product (the "tying" product) to a customer, requires that customer to

(i) acquire any other product from the supplier or the supplier's nominee, or

(ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.

Exclusive dealing and tied selling

(2) Where, on application by the Commissioner, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

(a) impede entry into or expansion of a firm in a market,

(b) impede introduction of a product into or expansion of sales of a product in a market, or

(c) have any other exclusionary effect in a market,

with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

Market restriction

(3) Where, on application by the Commissioner, the Tribunal finds that market restriction, because it is engaged in by a major supplier of a product or because it is widespread in relation to a product, is likely to substantially lessen competition in relation to the product, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in market restriction and containing any other requirement that, in its opinion, is necessary to restore or stimulate competition in relation to the product.

Where no order to be made and limitation on application of order

(4) The Tribunal shall not make an order under this section where, in its opinion,

(a) exclusive dealing or market restriction is or will be engaged in only for a reasonable period of time to facilitate entry of a new supplier of a product into a market or of a new product into a market,

(b) tied selling that is engaged in is reasonable having regard to the technological relationship between or among the products to which it applies, or

(c) tied selling that is engaged in by a person in the business of lending money is for the purpose of better securing loans made by that person and is reasonably necessary for that purpose,

and no order made under this section applies in respect of exclusive dealing, market restriction or tied selling between or among companies, partnerships and sole proprietorships that are affiliated.

Where company, partnership or sole proprietorship affiliated

(5) For the purposes of subsection (4),

(a) one company is affiliated with another company if one of them is the subsidiary of the other or both are the subsidiaries of the same company or each of them is controlled by the same person;

(b) if two companies are affiliated with the same company at the same time, they are deemed to be affiliated with each other;

(c) a partnership or sole proprietorship is affiliated with another partnership, sole proprietorship or a company if both are controlled by the same person; and

(d) a company, partnership or sole proprietorship is affiliated with another company, partnership or sole proprietorship in respect of any agreement between them whereby one party grants to the other party the right to use a trade-mark or trade-name to identify the business of the grantee, if

(i) the business is related to the sale or distribution, pursuant to a marketing plan or system prescribed substantially by the grantor, of a multiplicity of products obtained from competing sources of supply and a multiplicity of suppliers, and

(ii) no one product dominates the business.

When persons deemed to be affiliated

(6) For the purposes of subsection (4) in its application to market restriction, where there is an agreement whereby one person (the "first" person) supplies or causes to be supplied to another person (the "second" person) an ingredient or ingredients that the second person processes by the addition of labour and material into an article of food or drink that he then sells in association with a trade-mark that the first person owns or in respect of which the first person is a registered user, the first person and the second person are deemed, in respect of the agreement, to be affiliated.

Abuse of Dominant Position

Section 78

Definition of "anti-competitive act"

78. For the purposes of section 79, "anti-competitive act", without restricting the generality of the term, includes any of the following acts:

(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;

(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

(f) buying up of products to prevent the erosion of existing price levels;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

Section 79

Prohibition where abuse of dominant position

79. (1) Where, on application by the Commissioner, the Tribunal finds that

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

Additional or alternative order

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

Limitation

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

Superior competitive performance

(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.

Exception

(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

Limitation period

(6) No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice has ceased.

Where proceedings commenced under section 45 or 92

(7) No application may be made under this section against a person

(a) against whom proceedings have been commenced under section 45, or

(b) against whom an order is sought under section 92

on the basis of the same or substantially the same facts as would be alleged in the proceedings under section 45 or 92, as the case may be.

Section 80

Definition of "delivered pricing"

80. (1) For the purposes of section 81, "delivered pricing" means the practice of refusing a customer, or a person seeking to become a customer, delivery of an article at any place in which the supplier engages in a practice of making delivery of the article to any other of the supplier's

customers on the same trade terms that would be available to the first-mentioned customer if his place of business were located in that place.

Definition of "trade terms"

(2) For the purposes of subsection (1), the expression "trade terms" means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

Section 81

Delivered pricing

81. (1) Where, on application by the Commissioner, the Tribunal finds that delivered pricing is engaged in by a major supplier of an article in a market or is widespread in a market with the result that a customer, or a person seeking to become a customer, is denied an advantage that would otherwise be available to him in the market, the Tribunal may make an order prohibiting all or any of such suppliers from engaging in delivered pricing.

Exception where significant capital investment needed

(2) No order shall be made against a supplier under this section where the Tribunal finds that the supplier could not accommodate any additional customers at a locality without making significant capital investment at that locality.

Exception where trade-mark used

(3) No order shall be made against a supplier under this section in respect of a practice of refusing a customer delivery of an article that the customer sells in association with a trade-mark that the supplier owns or in respect of which the supplier is a registered user where the Tribunal finds that the practice is necessary to maintain a standard of quality in respect of the article.

Appendix 3

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INTERVIEWS CONDUCTED

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Gwill Allen, Assistant Deputy Commissioner
Anindya Sen, Economist

B. Other Interviews

Daniel Bellemare,
Centre for the Study of Regulated Industries, McGill University

Paul Crampton,
Davies, Ward & Beck

Dan McTeague,
Member of Parliament

Frank Roseman

John Scott,
Canadian Federation of Independent Grocers

Manju Sekhri,
Independent Retail Gasoline Marketers Association

Colleen Vanderkercove,
Col-Rob Holdings Ltd.

Fred Wade,
Wade Enterprises Ltd.

Garth Whyte,
André Piché,
Canadian Federation of Independent Business

Barry Zalmanowitz,
Fraser Milner

AUTHORS OF THE REPORT

This study was prepared by J. Anthony VanDuzer and Gilles Paquet of the University of Ottawa with the assistance of Derek Smith and Lorne Ptack, both law students in the Common Law Section of the Faculty of Law at the University of Ottawa.

J. Anthony VanDuzer is an associate professor and former Vice Dean of the Common Law Section of the Faculty of Law at the University of Ottawa. Prior to joining the Section in 1989, he practised corporate and commercial law in Toronto with Fasken & Calvin (now Fasken Campbell Godfrey). At the law school, Professor VanDuzer teaches various courses in business law including International Business Transactions. He has also taught in the Multinational Management Course in the University of Ottawa's Executive MBA program. He has provided advice to the Canadian Competition Bureau on amendments to the merger notification provisions of the Canadian *Competition Act* as well as conducting research for the Bureau on the prospects for an international agreement on competition law. Professor VanDuzer has acted as an advisor to the law firm of Macleod Dixon on competition and trade law issues.

Professor VanDuzer=s publications include a book on merger notification under the Canadian *Competition Act* (with Albert Gourley) and articles on various business and trade law issues including competition and intellectual property. He is also the author (with Albert Gourley) of the competition law chapter of the *Canada Corporations Law Reporter*. He received his B.A. from Queens University, his LL.B. from the University of Ottawa and his LL.M. from Columbia University.

Gilles Paquet studied economics at the graduate level at Laval, Queen's (Canada) and at the University of California where he was Postdoctoral Fellow in Economics. He was Dean of the Faculty of Graduate Studies and Research at Carleton in the 1970s and Dean of the Faculty of Administration at the University of Ottawa in the 1980s. Professor Paquet has authored/co-authored or edited over 25 books and written over 250 papers or chapters and books on issues ranging from economic history of Canada, regional and industrial development, trade and technology, governance and public management. He has been président of the Social Sciences Federation of Canada and of a large number of other Canadian associations. He was Secretary-Treasurer of the Canadian Economics Association from 1967 to 1981. At the end of 1997, he was appointed Director of the Centre on Governance at the University of Ottawa.

Professor Paquet is a Fellow of the Royal Society of Canada and of the Royal Society of Arts of London. He has received in 1982 the Jacques-Rousseau Medal in recognition of important contributions of a multi-disciplinary nature and the Esdras-Minville Medal in 1989 for the corpus of his works in social sciences. He was named Member of the Order of Canada in 1992. In 1993, he received the Award for Excellence in Research at the University of Ottawa. Between 1978 and 1991, he was a regular interviewer/commentator/animateur on the national radio or television network of Radio-Canada. Between

1992 and 1997, he was an editorial writer for Le Droit. Since 1995, he has been a member of STUDIO 2 weekly panel on national affairs on TV Ontario.